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Nos. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief For Petitioners In No. 86-497

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QUESTIONS PRESENTED

1. How should the courts choose statutes of limitations for use with civil RICO claims? Should such claims be characterized in the same way or should they be evaluated differently depending on the nature of the RICO predicate racketeering act or acts presented by each claim?

2. When do limitations periods begin to run on civil RICO claims?

LIST OF ALL PARTIES

The parties in the Court of Appeals for the Third Circuit were:

Malley-Duff & Associates, Inc.

Appellant: plaintiff in the district court

Crown Life Insurance Company
Agency Holding Corporation, an Illinois corporation
Agency Holding Corporation, an Ohio corporation
Clarke Burton Lloyd
Kerry Patrick Craig
Diane Pariano
Erhman Ratini Oglevee & Craig, Inc.
Robert Oglevee

Appellees: defendants in the district court

Petitioners in No. 86-497 understand that Crown and Lloyd, petitioners in No. 86-531, will file a separate brief.

LISTING UNDER SUPREME COURT RULE 28.1

Set forth below is a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), and Ehrman Ratini Oglevee & Craig, Inc.:

Agency Management, Inc.
American Assurance Marketers, Inc.
Crown Associates of Arizona, Inc.
Crown Associates of Colorado, Inc.
Crown Associates of Minneapolis, Inc.
Kerry P. Craig & Associates, Inc.
Craig Associates, Inc.
R. C. Oglevee & Associates, Inc.

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Brief For Petitioners In No. 86-497

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 792 F.2d 341 (1986) and appears in the Joint Appendix beginning at page 70. The Opinion of the district court, not yet reported, appears in the Joint Appendix beginning at page 56.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 30, 1986. Petitioners' timely application for rehearing was denied on July 1, 1986.

Petitioners filed their Petition for Writ of Certiorari on September 26, 1986. The Petition was granted by Order of this Court on December 1, 1986.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The sections of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982) which this case involves are: §§ 1961(1), (4) and (5); § 1962; and § 1964(c).

The sections of Pennsylvania's statutes of limitations which this case involves are: 42 Pa. Cons. Stat Ann. § 5524 and § 5527 (Purdon 1981).

The full text of each of these sections is set forth in Appendix D to the Petition for Certiorari filed in No. 86-497.

STATEMENT OF THE CASE

From 1967 to February 13, 1978, Malley-Duff and Associates, Inc. was a general agent of Crown Life Insurance Company in Pittsburgh, Pennsylvania. Crown terminated Malley-Duff's agency contract as of February 13, 1978, pursuant to a 30-day termination clause in the contract. (J.A. 6, 23).

After proceeding unsuccessfully in state court for injunctive relief, Malley-Duff in April 1978 filed suit in federal district court in the Western District of Pennsylvania (hereinafter "MD-I"), against defendants Crown, Lloyd, Craig, Agency Holding Company (Illinois) and Agency Holding Company (Ohio). (Complaint, Civil Action No. 78-373 W.D. Pa.). Malley-Duff alleged federal antitrust law violations and various common law claims, including breach of contract, tortious interference and common law conspiracy to tortiously interfere. Malley-Duff claimed damages resulting from the termination of its contract. (Complaint, Civil Action No. 78-373, ¶¶ 17-60).

On March 20, 1981, while MD-I was in pretrial discovery, Malley-Duff filed the instant suit (hereinafter "MD-II") alleging *inter alia* four civil RICO counts. (J.A. 7-16). The four RICO counts in the MD-II complaint track the four substantive subsections of 18 U.S.C. §§ 1962(a), (b), (c), and (d). All four counts are based on allegations that defendants "associated themselves as an enterprise . . . to acquire, take over or eliminate various Crown agencies that had lucrative territories in the United States." (J.A. 7). Defendants acquired various Crown agencies by "false and fraudulent means and pretenses," (J.A. 8) and committed multiple violations of 18 U.S.C. §§ 1341, 1342 and 1503 (mail and wire fraud and obstructions of

justice) (J.A. 7-10). Defendants imposed a "bogus quota" on Malley-Duff, which was "impossible to meet." (J.A. 8). When Malley-Duff failed to meet the quota, defendants "seized its business and goodwill without compensation." (J.A. 9). Plaintiff alleged injury to its business or property from the termination of its agency contract and from interference with its established customers. (J.A. 11-16).

In MD-II, Malley-Duff claimed damages (1) resulting from its termination and (2) resulting from expenses and delays from alleged obstructions of justice in MD-I. (J.A. 9-10). The district court and the court of appeals chose to treat each of these claims separately. (J.A. 57, 74-75).

MD-I and MD-II were consolidated on November 2, 1981 and discovery proceeded jointly on both cases.

On July 29, 1982, defendants filed Motions for Summary Judgment in both MD-I and MD-II. (J.A. 28).

On January 10, 1983, the district court severed MD-II from the trial of MD-I.

On March 8, 1983, MD-I went to trial for five weeks before a jury. Defendants won a directed verdict on Malley-Duff's antitrust claims at the close of Malley-Duff's case. The trial proceeded on Malley-Duff's tortious interference and common law civil conspiracy claims. The jury returned verdicts (subsequently held to be inconsistent by the court of appeals; *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (1984), *cert. denied*, 469 U.S. 1072 (1984)) finding that defendants were not liable for tortious interference but that Crown, Lloyd and Craig (but not the Agency Holding Company defendants) were liable for civil conspiracy to tortiously interfere.

Defendants and Malley-Duff appealed MD-I. The appeals were argued on March 5, 1984, and decided on May 7, 1984. In the meantime, on March 20, 1984, the district court granted defendants' Motions for Summary Judgment in MD-II on all counts. (J.A. 56). The district court held that the appropriate Pennsylvania limitations period was the two-year period contained in 42 Pa. Cons. Stat. Ann. § 5524(3) which covers actions for "taking, detaining or injuring personal property." (J.A. 58-60). The court then applied this limitations period to Malley-Duff's RICO claims. It held that the RICO claims based on Malley-Duff's termination on February 13, 1978 were time-barred after February 13, 1980—over a year before Malley-Duff filed MD-II. (J.A. 59-60).

The district court also dismissed plaintiff's RICO claims based on obstruction of justice for reasons not involving the statute of limitations. It held that interference with a lawsuit did not constitute an injury to business or property within the meaning of RICO. (J.A. 62).

Malley-Duff appealed MD-II. The appeals were argued before the Third Circuit Court of Appeals on November 19, 1985. On May 30, 1986, the circuit court reversed the district court and remanded. The circuit court held that, in borrowing limitations periods for civil RICO claims, the courts should apply uniformly in each state the one most appropriate state statute of limitations for all civil RICO claims. (J.A. 86). The court then selected the Pennsylvania six-year residual "catch-all" statute of limitations period for application to civil RICO claims arising in Pennsylvania and held that Malley-Duff's termination damages claims were not time-barred. (J.A. 93-96). The court also reinstated plaintiff's obstruction of justice claims holding that they did constitute an injury to "business or

property." (J.A. 99). Because it selected a six year limitations period, the Third Circuit did not reach the issue of when the limitations period began to run. (J.A. 77).

Timely petitions for rehearing *en banc* were filed by all defendants. They were denied on July 1, 1986. (J.A. 104-105).

On September 26, 1986, Petitioners filed a Petition for Writ of Certiorari with this Court. The Petition was granted on December 1, 1986.

SUMMARY OF ARGUMENT

Civil RICO provides enhanced civil remedies against persons who in the course of acquiring or maintaining an interest in, or conducting an enterprise through a pattern of racketeering activity injure plaintiff directly or indirectly by one or more of the racketeering activities forming the pattern.

The essence of civil RICO is that it provides its enhanced civil remedies only for injuries to business or property and only for injuries caused by a wide variety of specified "predicate" state and federal crimes.

Civil RICO contains no statute of limitations. The procedure and factors to consider when choosing a statute of limitations set forth in *Wilson v. Garcia*, 471 U.S. 261 (1985), when applied to civil RICO, require that a uniform approach be taken to characterizing the essence of RICO. The essence of civil RICO suggests that it is most analogous to tort actions for injuries to business or property. In Pennsylvania a two-year statute of limitations applies to such injuries.

Sedima, S.P.R.L. v. Imrex, ____ U.S. ____, 105 S. Ct. 3275 (1985), made it clear that a plaintiff need not causally trace his injury to a "confluence" of RICO's elements; he need not suffer a "racketeering injury" to recover civil RICO's enhanced remedies. Since *Sedima* a plaintiff need only trace his injury to a predicate racketeering act or to an overt act of a RICO conspiracy. Prior to *Sedima* those courts which read a "confluence," "racketeering injury" requirement into civil RICO imposed on RICO plaintiffs the burden of tracing their injury to continuous activity by defendants in the form of a pattern of racketeering activity. Since *Sedima* the element of continuity in a civil RICO

action is similar to the element of continuity in a continuing civil antitrust conspiracy action.

The usual federal accrual rules which apply to continuing civil antitrust conspiracies should be applied to civil RICO actions. These rules provide that a cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business. (*See infra* p. 30). Plaintiff's civil RICO termination claim is barred by the application of this rule and Pennsylvania's two-year statute of limitations.

ARGUMENT

I. CIVIL RICO PROVIDES ENHANCED CIVIL REMEDIES AGAINST PERSONS, WHO, IN THE COURSE OF ACQUIRING OR MAINTAINING AN INTEREST IN OR CONDUCTING AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, INJURE PLAINTIFF DIRECTLY OR INDIRECTLY BY ONE OR MORE OF THE RACKETEERING ACTIVITIES FORMING THE PATTERN. THE ESSENCE OF CIVIL RICO IS THAT IT PROVIDES ITS CIVIL REMEDIES ONLY FOR INJURIES TO BUSINESS OR PROPERTY AND ONLY FOR INJURIES CAUSED BY A WIDE VARIETY OF SPECIFIED "PREDICATE" STATE AND FEDERAL CRIMES.

Answering each of the questions presented for review requires an analysis of the structure and essence of civil RICO as it has been construed and interpreted in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. ____, 105 S. Ct. 3275 (1985).

Civil RICO provides enhanced civil remedies against persons who acquire or maintain an interest in, or conduct an enterprise through a pattern of racketeering activity. 18 U.S.C. §§ 1962 and 1964(c).

Prior to *Sedima*, the lower courts were divided over what causal relationship was required in civil RICO between the elements of the conduct made "unlawful" and prohibited by § 1962, and plaintiff's injuries.

A number of the lower courts, including the Second Circuit in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (1984), had held that a plaintiff suing under

§§ 1962(a)-(c) must causally trace his injury to a "confluence," 105 S. Ct. at 3297 (Marshall, J., dissenting), of the elements of one of these subsections in order to recover. According to this interpretation of § 1964(c), only if a plaintiff could prove a "racketeering injury," 105 S. Ct. at 3285, that is, an injury traceable to a "confluence" of the elements of a § 1962(a), (b) or (c) offense, could plaintiff recover the enhanced civil remedies provided by § 1964(c).

Two other causation requirements could have been read into § 1964(c). The courts could have required that a plaintiff trace his injury to a "pattern of racketeering activity," one of the elements of the conduct made unlawful by §§ 1962(a)-(c), or they could have required "merely" that plaintiff trace his injury to "the commission of a [single] predicate act." 105 S. Ct. at 3297 (Marshall, J., dissenting).[1]

In *Sedima* the Court rejected the "confluence" or "racketeering injury" interpretation of § 1964(c). The four dissenters in *Sedima* accepted it. Since *Sedima*, it is clear that a plaintiff does not need to prove that his injury was caused by a "confluence" of the elements of a § 1962 violation; he need not prove a "racketeering injury."

Writing for the *Sedima* majority, Justice White stated:

> If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions [§§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, then plaintiff has a claim under § 1964(c). There is no room in the

[1]Note that this causation problem is not presented by RICO's criminal sections because no causal link to injury is required in a RICO criminal prosecution. A prosecutor need only prove the elements of a § 1962 violation to convict.

> statutory language for an additional, amorphous 'racketeering injury' requirement.

105 S. Ct. at 3285 (footnote omitted).

> [T]he statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

105 S. Ct. at 3286 (footnote omitted). While this language could be read to mean that plaintiff must trace its injury to a pattern of racketeering *activities*—plural—we believe that the majority did not intend this.[2] We believe that the Court meant to allow recovery for injury from one predicate act, as long as plaintiff could prove that this act was part of a pattern of racketeering activity through which defendants committed a § 1962(a), (b) or (c) offense. This belief is supported by the *Sedima* dissent's interpretation of the majority opinion, *see* 105 S. Ct. at 3297, and by the

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[2]At least one district court has explicitly read *Sedima* as requiring plaintiff to trace its injury to a pattern of racketeering activities. *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, No. 84-4056 (D.N.J. filed Dec. 2, 1986) (available on LEXIS, Genfed Library, Dist. file). In its brief before the Third Circuit, plaintiff took the position that when its agency contract was terminated, no pattern of racketeering activity had been committed by defendants. (Brief for Appellant, 32-34). If *Sedima* is read as requiring plaintiff to trace his injury to a pattern of racketeering activity rather than merely to a single racketeering act, and plaintiff's position remains as stated in its Third Circuit brief, plaintiff has no cause of action for its termination under RICO §§ 1962(a)-(c). Plaintiff might still have a § 1962(d) RICO conspiracy cause of action provided it can prove that defendants had conspired, as of the time of plaintiff's termination, to engage in the conduct §§ 1962(a), (b) or (c) makes unlawful.

singular, not plural, language used by Justice White in footnote 15.[3]

> Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to 'the direct victims of the [racketeering] activity.' . . .

105 S. Ct. at 3286 n. 15 (brackets in original).

Civil RICO, as it has been construed and interpreted in *Sedima*, in effect describes what one must do to be subject to RICO's new civil remedies. Civil RICO is not a substantive statute; it merely adds enhanced civil remedies for already existing predicate act state and federal crimes. *See United States v. Turkette*, 452 U.S. 576, 586 (1981) and Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1021 n. 71 (1980) [hereinafter referred to as RICO: Basic Concepts].[4]

The Justices who dissented in *Sedima* read § 1962 differently. They interpreted §§ 1962(a)-(c) as stating the

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[3]Footnote 15 also suggests that *Sedima* allows recovery for indirect "competitive" injuries and "racketeering injuries" in addition to direct injuries "from the commission of a predicate act." 105 S. Ct. at 3286 n. 15.

[4]G. Robert Blakey is Professor of Law and Director of the Notre Dame Institute on Organized Crime, Notre Dame Law School. Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970, when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970), was passed. Brian Gettings was Counsel and Director of the House Republican Conference Task Force on Crime from 1967 to 1969, when legislative predecessors to the Organized Crime Control Act were drafted and first considered.

elements of three new substantive federal civil wrongs and would have required a plaintiff to prove an injury traceable to a "confluence" of these elements—a "racketeering injury"—in order to recover. 105 S. Ct. at 3297 (Marshall, J., dissenting). The majority in *Sedima* rejected this approach and allowed recovery against defendants who violate §§ 1962(a), (b) or (c) for injuries from the predicate criminal acts themselves.

Civil RICO after *Sedima* can be helpfully analogized to those statutes that impose additional penalties on persons who are repeat offenders[5] or who use a weapon when they commit existing crimes.[6] Because such offenders are more threatening and more dangerous to society additional sanctions have been put in place for use against them. Likewise, with RICO offenders as described in RICO § 1962. If defendants engage in a pattern of racketeering activity and thereby acquire (§ 1962(a)), maintain (§ 1962(b)), or conduct (§ 1962(c)) an enterprise they are more threatening and more dangerous to society. RICO put additional sanctions in place for use against them.

RICO was designed by its drafters as an attack on organized crime:

> [I]t was the declared purpose of Congress 'to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and

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[5]For example, the Controlled Substances Import and Export Act, 21 U.S.C. § 962 (1981), imposes twice the imprisonment and/or fine, otherwise authorized, for the commission of a second or subsequent offense under the Act.

[6]For example, 18 U.S.C. § 2113(d) (1984), dealing with bank robbery, imposes enhanced sanctions of a $10,000 fine and/or imprisonment of twenty-five years when a person robbing or attempting to rob a bank "puts in jeopardy the life of any person by the use of a dangerous weapon or device."

4. As to the averments of paragraph 13 of the Complaint, it is admitted that, from 1967 until February 11, 1978, Plaintiff was an insurance agent licensed by the Commonwealth of Pennsylvania and, subject to the terms of such written contracts as were from time to time in effect, represented Defendant Crown as one of its general agents in the vicinity of Pittsburgh, Pennsylvania, was empowered to solicit applications for and to service policies of insurance written by the Defendant Crown, and did in fact solicit applications for and service such policies for policyholders located in Pennsylvania. Except as herein expressly admitted, the averments of said paragraph 13 are denied.

5. As to the averments of paragraph 14 of the Complaint, is is admitted that Thomas E. Malley and James A. Duff, Jr., have in part owned entities which for some time prior to February 11, 1978 acted as a general agent for Defendant Crown in the vicinity of Pittsburgh, Pennsylvania. As to the remaining averments of said paragraph 14, these Defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

Second Defense (as to all six counts)

6. Beginning several years prior to Plaintiff's termination, and as a result of Plaintiff's inadequate representation of Defendant Crown in the vicinity of Pittsburgh, Pennsylvania, Defendant Crown's percentage of the insurance business done in that vicinity had become and thereafter remained lower than it was reasonable to expect.

7. In response to these disappointing results, Defendant Crown had on numerous occasions orally notified

Plaintiff that Plaintiff's performance in behalf of Defendant Crown was inadequate and demanded that Plaintiff increase its marketing efforts. However, such notices and demands did not result in any improvement; Plaintiff's performance continued to be disappointing.

8. As a result of Plaintiff's continuing poor performance, Defendant Crown by letter dated August 17, 1977, advised Plaintiff of certain levels of performance that should be met and maintained. By letter dated October 4, 1977, Defendant Crown urged Plaintiff to put forth every effort to avoid termination of the agency contract for lack of production at the beginning of 1978.

9. The general agency contract in effect between Plaintiff and Defendant Crown during 1977 provided, in pertinent part, as follows:

> 30. This Agreement may be terminated on one month's notice by either party and such notice will be deemed to have been given when a registered letter containing the notice is mailed addressed to the party entitled to notice at the party's last known address.

This was not a new provision; prior contracts included the same language.

10. Plaintiff failed to achieve the level of performance referred to in the aforesaid letters. Defendant Crown, in the exercise of its rights under the contract provision above quoted, by letter dated and mailed by registered mail on January 11, 1978, notified Plaintiff that its general agency would terminate one month thereafter.

11. The termination of Plaintiff's general agency contract was motivated, not by any of the purposes charged

in the complaint, but solely to assure that Defendant Crown would be adequately represented in the vicinity of Pittsburgh, Pennsylvania by a general agency that would make satisfactory marketing efforts. No falsity or fraud of any sort whatsoever was involved in the decision to terminate the agency relationship, nor was it part of any conspiracy.

12. Neither of these defendants has in any way affected or obstructed the administration of justice, nor engaged in any attempt to do so, nor has either of these defendants engaged in any conspiracy to do so.

13. The conduct of these defendants was not such as to violate 18 U.S.C. § 1341, 18 U.S.C. § 1342, 18 U.S.C. § 1503, 42 U.S.C. § 1985, 42 U.S.C. § 1986, or any one or more of them, and hence no recovery can be had under any subsection of 18 U.S.C. § 1962 or under 42 U.S.C. § 1988.

Third Defense (as to all six counts)

14. The Complaint fails to state a claim under which relief can be granted.

WHEREFORE defendants Crown life Insurance Company and Clarke Burton Lloyd ask that judgment be entered in their favor and against the Plaintiff on all six counts in the complaint, and that they be allowed their costs.

/s/ Alexander Black
/s/ Ramona J. Rokoski
/s/ Robt. W. Brown
/s/ Buchanan Ingersoll Rodewald
Kyle & Buerger
Attorneys for Crown Life Insurance Company and Clarke Burton Lloyd, Defendants

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

AMENDMENT TO ANSWER

Defendants Crown Life Insurance Company and Clarke Burton Lloyd amend their Answer in the above titled case as follows:

FOURTH DEFENSE (as to all six counts)

15. Counts one through six of the Complaint are barred by the applicable statute of limitations.

Dated: July 9, 1982

BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER, P.C.

By: /s/ Alexander Black

/s/ Ramona J. Rokoski

/s/ Robert W. Brown
Attorneys for Defendants Crown Life Insurance Company and Clarke Burton Lloyd

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

AMENDED ANSWER

I. Answer of Defendants, Agency Holding Corporation, (Illinois), Agency Holding Corporation (Ohio), Kerry Patrick Craig, Diane Pariano, Ehrman, Ratini, Oglevee & Craig, Inc. and Robert Oglevee

First Defense As To All Six Counts

1. Defendants admit the allegations in the following paragraphs of the complaint: 2, 3, 4, 5, 6, 7, 8, 9, 12 and 17; except that the present address of: (a) Agency Holding Corporation (Illinois) is Room 1760, 208 LaSalle Street; (b) Agency Holding Corporation (Ohio) is Suite 1203, No. 1, Erieview Plaza; (c) Kerry Patrick Craig is 387 Sterling, Kenilworth, Illinois; (d) Diane Pariano is 387 Sterling, Kenilworth, Illinois; and (e) Ehrman, Ratini, Oglevee & Craig is Suite 2000, 309 Smithfield Street, Pittsburgh, Pennsylvania.

2. Defendants deny the allegations in the following paragraphs of the Complaint and each and every subpara-

graph and sub-paragraph thereof: 10, 11, 16, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 31, 32, 34, 35, 36, 37, 38, 39, 40, 42 and 43.

3. Defendants are without knowledge or information sufficient to form a belief as to the allegations in the following paragraphs of the Complaint: 1, 13, 14 and 15.

4. Defendants' answers to the paragraphs of the Complaint incorporated in paragraphs 24, 27, 30, 33 and 41 of the Complaint are set forth in paragraphs 1, 2 and 3 of this Amended Answer.

Second Defense As To All Six Counts

5. The Complaint fails to state a claim upon which relief can be granted.

Third Defense As To All Six Counts

6. Counts one through six are barred by applicable one or two year statutes of limitations.

WHEREFORE, Defendants ask that judgment be entered in their favor and against Plaintiff on all six counts in the Complaint, and that they be awarded attorneys' fees and costs.

Dated:

THORP, REED & ARMSTRONG

By: /s/ Charles Weiss

/s/ John H. Bingler, Jr.

/s/ Glenn E. Bost, II

Attorneys for Defendants, Agency Holding Corporation, (Illinois), Agency Holding Corporation, (Ohio), Kerry Patrick Craig, Diane Pariano Ehrman, Ratini, Oglevee & Craig, Inc. and Robert Oglevee

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,
a corporation,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,

Defendants.

NOTICE
and
MOTION FOR SUMMARY JUDGMENT

Please take Notice that the following Motion for Summary Judgment will be filed with the Clerk of Court on July 29, 1982.

THORP, REED & ARMSTRONG

By: /s/ JOHN H. BINGLER, JR.
John H. Bingler, Jr.

By: /s/ GLENN E. BOST, II
Glenn E. Bost, II

Attorneys for Defendants,
Agency Holding Corporation, an
Illinois Corporation, Agency
Holding Corporation, an Ohio
Corporation, Kerry Patrick
Craig, Diane Pariano, Ehrman
Ratini Oglevee & Craig, Inc.,
and Robert Oglevee

MOTION FOR SUMMARY JUDGMENT

Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), Ehrman Ratini Oglevee & Craig, Kerry Patrick Craig, Robert Oglevee and Diane Pariano (hereinafter the "Agency defendants"), by their attorneys move the Court for summary judgment. This motion applies only to plaintiff's 1981 Complaint. The Agency defendants adopt by reference the Motion for Summary Judgment filed by defendants Crown Life Insurance Company (hereinafter "Crown") and Clarke Burton Lloyd applicable to Plaintiff's 1978 Complaint.

Preliminary Statement

Background

On or about January 11, 1978, Crown notified plaintiff that its General Agency Agreement would be terminated, effective in one month. (Craig Affidavit attached hereto para. 7 and Exhibit B thereto.) On February 10, 1978, plaintiff sued in state court for preliminary and permanent injunctions against the termination. When plaintiff's request for a preliminary injunction was denied plaintiff abandoned its state court action and in April 1978, sued in this Court.

In this 1978 suit plaintiff's Complaint alleged antitrust violations, tortious interference, breach of contract, etc., and sought an injunction against the termination and damages for injuries resulting from the termination. Defendants' Answers alleged that the termination was lawful and pursuant to the General Agency Agreement and was prompted by plaintiff's inadequate performance and failure to meet a reasonable production standard for 1977

(Answer of defendants Crown & Lloyd—Third Defense), which was lower than production achieved by plaintiff in a number of years prior to 1977 (Craig Affidavit para. 3; February 1978 Common Pleas Hearing transcript attached hereto at p. 125 and Exhibit A thereto). Plaintiff's Complaint had alleged that the production standard was unrealistic and unreachable.

Almost three years later, in March, 1981, plaintiff again sued in this Court, alleging RICO and Civil Rights claims and a pendent common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to support its RICO claim by alleging, for the first time, that Crown's 1977 production standard was fraudulent and therefore constituted mail and wire frauds (RICO predicate offenses). It also alleges that plaintiff was defrauded of vested renewal commissions to which it was entitled. There is no evidence to support the allegation that plaintiff lost any vested renewal commissions (Craig Affidavit para. 8).

Plaintiff's 1981 Complaint attempts to support both its RICO and Civil Rights claims by alleging that during the discovery phase of the 1978 suit defendants engaged in various obstructions of justice (RICO and Civil Rights Act violations). The 1981 Complaint alleges that these obstructions, which occurred well after the termination, injured plaintiff by causing it "great expenses, delays and inconvenience [in its 1978 case and by denying plaintiff] Relevant and material evidence [in its 1978 case]."

In 1979, plaintiff had sought relief from the alleged obstructions of justice by way of a Motion for Sanctions filed in the 1978 suit. This Motion was voluntarily abandoned by plaintiff after the 1981 suit was filed. A four

day hearing on plaintiff's 1979 Motion for Sanctions was interrupted in June of 1979, when the then-presiding judge referred plaintiff's allegations to the U.S. Attorney for investigation. In 1981, the U.S. Attorney reported to this Court that no prosecution was contemplated.

Summary of Defendants' Arguments

Plaintiff has not been injured by any RICO or Civil Rights violations. Both RICO and the Civil Rights Act give causes of action to persons injured by activities the Acts prohibit; but plaintiff has not been injured by activities prohibited by RICO or the Civil Rights Act.

This is so because the only injury actually suffered by plaintiff was not caused by an activity prohibited by RICO or the Civil Rights Act. There is simply no casual connection between any allegedly wrongful activity of defendants and the only injury actually suffered by plaintiff for which the law might provide a remedy, namely, the termination of its General Agency Agreement in February, 1978. All of the obstructions of justice alleged in the 1981 Complaint, which, if proved, might constitute RICO and Civil Rights violations, took place after the termination and therefore could not have caused it. There is no evidence to show that a conspiracy to commit the alleged obstructions of justice antedated the termination.

The 1981 Complaint attempts to overcome this causation problem by claiming that the 1977 production standard, which caused the termination, constituted mail and wire frauds (RICO predicate offenses). Plaintiff may hope to prove that the standard was unrealistically high or unreachable, but there is no evidence that any fraud was involved. There were simply no misrepresentations.

Parenthetically, even if the production standard can somehow be tortured into a mail or wire fraud, any 1981 suit seeking recovery for the termination in 1978 is barred by the state statute of limitations applicable to civil RICO actions. This bar applies with equal force to plaintiff's common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to overcome the absence of a casual connection between an activity prohibited by RICO or the Civil Rights Act and legally actionable injury to plaintiff, by alleging as injuries the "great expenses, delays and inconvenience . . . imposed upon Plaintiff in its" 1978 case, and the denial of "Relevant and material evidence" in this 1978 case (hereinafter referred to as "lawsuit injuries").

These alleged "lawsuit injuries" are simply not injuries recognized as actionable by the common law or RICO or the Civil Rights Act. The law simply does not recognize a separate cause of action for "lawsuit injuries" which could be remedied by sanctions available during a pending lawsuit. If it did, parties would thereby be afforded the option of either pursuing sanctions for the "lawsuit injuries" discovered during the pendency of a lawsuit or bringing separate common law or RICO or Civil Rights suits. Failing to pursue available sanctions could distort the outcome of a pending lawsuit. Opting to refrain from pursuing available sanctions would be the actual cause of the "lawsuit injuries" since they could have been avoided or eliminated by sanctions. Furthermore, parties to lawsuits could convert any serious discovery dispute in federal or state court into a common law conspiracy, RICO or Civil Rights suit.

In addition, RICO provides remedies only for commercial or competitive injuries, not "lawsuit injuries". The Civil Rights Act in pertinent part provides remedies only when parties or witnesses are subjected to intimidation or threats. There is no evidence of intimidation or threats in this case even though plaintiff's 1981 Complaint makes this allegation.

To recover under the Civil Rights Act a plaintiff must prove that he was personally subjected to intimidation or threats, and that defendant was motivated by a class based animus. Plaintiff's Complaint does not allege the second element, and there is no evidence to support the first.

Even if RICO provided a cause of action for "lawsuit injuries", plaintiff's claims for these injuries are barred by the one year state statute of limitations applicable to civil RICO claims. Plaintiffs cause of action arose, if at all, in 1979 and was not sued on until 1981.

If the Court grants summary judgment against plaintiff's RICO and Civil Rights claims, it should dismiss the common law conspiracy claim because of a lack of any basis for asserting pendent jurisdiction.

Finally, the court should grant summary judgment in favor of individual defendant Pariano because there is no evidence that she participated in or caused the termination of plaintiff's General Agency Agreement (Pariano Affidavit attached hereto).

1. Motion For Summary Judgment On Plaintiff's RICO Claims

1. Plaintiff filed its 1981 Complaint on March 20, 1981.

2. Counts 1 through 4 of plaintiff's Complaint assert causes of action based on section 1964(c) of the RICO statute, 18 USC § 1964(c)(1970).

3. RICO section 1964(c) gives a cause of action to "Any person injured in his business or property by reason of a violation of section 1962. . . ."

4. Plaintiff has not been injured in its business or property by any RICO violation.

5. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February 1978.

6. RICO does not provide a remedy or recognize as actionable injuries, the "lawful injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

7. RICO provides a remedy only for commercial or competitive injury to "business or property."

8. There is no evidence that any RICO violation occurred prior to the termination or caused it.

9. The 1977 performance standard alleged in the complaint as a mail or wire fraud was not a fraud or a RICO violation.

10. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

11. The incidents which are alleged in the Complaint to be obstructions of justice all occurred subsequent to the termination and did not cause it.

12. Counts 1 through 4 of the Complaint are barred by the state statute of limitations applicable to private RICO actions, 42 Pa. C.S.A. § 5523(2).

13. Plaintiff's RICO actions accrued, if at all, more than one year prior to the filing of its 1981 Complaint, and are therefore barred by the applicable state statute of limitations.

14. The statute of limitations on private RICO actions runs from the last act committed as part of a pattern of racketeering activity which causes injury to a plaintiff's business or property.

15. The last act committed as part of an alleged pattern of racketeering activity which caused legally actionable injury to plaintiff's business or property was the termination of plaintiff's General Agency Agreement in February, 1978.

16. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Counts 1 through 4 of plaintiff's Complaint.

II. Plaintiff's Civil Rights Claims

17. Count 5 of plaintiff's 1981 Complaint asserts a cause of action based on section 1985 (2) of the Civil Rights Act, 42 USC § 1985 (2).

18. Section 1985 (2), in pertinent part, prohibits conspiracies

> to deter by . . . intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying . . . freely, fully, and truthfully. . . .

and gives a cause of action to anyone

> injured in his person or property . . . for the recovery of damages, occasioned by such injury . . . against any one or more of the conspirators.

19. Count 5 asserts that defendants conspired "to deter, by intimidation and threat, plaintiff and witnesses in [the pending 1978 lawsuit] from prosecuting that action and from testifying therein . . . ."

20. The only injuries asserted by plaintiff in Count 5 are the same "lawsuit injuries" claimed in the RICO counts, Counts 1-4—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]".

21. The Civil Rights Act does not provide a remedy or recognize as injuries the "lawsuit injuries" alleged in the Complaint.

22. The Civil Rights Act in pertinent part provides a remedy only against persons who conspire to deter any party or witness by intimidation, or threat. There is no evidence that defendants participated in such a conspiracy.

23. The Civil Rights Act in pertinent part provides a remedy only for plaintiffs who are personally subjected to

intimidation or threats. There is no evidence that plaintiff was so subjected.

24. The Civil Rights Act in pertinent part provides a remedy only where defendants were motivated by a class based animus. Plaintiff's Complaint does not allege this essential element.

25. Count 5 of the Complaint is barred by the state statute of limitations applicable to Civil Rights actions, 42 Pa. C.S.A. § 5524.

26. Plaintiff's Civil Rights action accrued, if at all, more than two years prior to the filing of its' 1981 Complaint, and is therefore barred by applicable statute of limitations.

27. The statute of limitations on Civil Rights actions runs from the last act committed as part of a conspiracy which causes injury to plaintiff.

28. The last acts committed as part of an alleged conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency Agreement in February 1978.

29. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 5 of plaintiff's Complaint.

III. Plaintiff's Common Law Conspiracy Claims

30. Count 6 of plaintiff's Complaint asserts a cause of action based on the common law of conspiracy with jurisdiction allegedly based on pendent jurisdiction principles.

31. Conspiracy law gives a cause of action to persons injured by common law conspiracies.

32. Plaintiff has not been injured by any common law conspiracy.

33. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

34. The common law of conspiracy does not provide a remedy or recognize as actionable injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

35. There is no evidence that any common law conspiracy existed prior to the termination or caused it.

36. The 1977 performance standard alleged in the Complaint as a fraud was not a fraud.

37. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

38. The obstructions of justice alleged in the Complaint all occurred subsequent to the termination and did not cause it.

39. Count 6 of the Complaint is barred by the statute of limitations applicable to common law conspiracy actions, 42 Pa. C.S.A. § 5524.

40. Plaintiff's common law conspiracy action accrued, if at all, more than two years prior to the filing of its 1981

Complaint and, therefore, is barred by the applicable statute of limitations.

41. The statute of limitations on common law conspiracy actions runs from the last act allegedly committed as part of a common law conspiracy which causes injury to plaintiff.

42. The last act committed as part of an alleged common law conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency contract in February, 1978.

43. Because summary judgment against the federal law claims in this Complaint should be granted, no basis exists for the continued assertion of pendent jurisdiction. Count 6 should be dismissed.

44. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 6 of plaintiff's Complaint.

IV. Plaintiff's Claims Against Diane Pariano

45. All six counts of plaintiff's Complaint assert claims against Diane Pariano.

46. Diane Pariano was not named as a defendant in plaintiff's 1978 suit and is named only once in plaintiff's 1981 complaint.

47. Diane Pariano did not participate in any way in any actions which led to the termination of plaintiff's General Agency Contract. (Pariano Affidavit attached hereto).

48. As of the date of plaintiff's termination in February, 1978, Diano Pariano was a 19 or 20 year old secretary

in a one-secretary office operated in Cleveland by Agency Holding Corporation (Ohio). She had held that position for approximately six months. Prior to that she attended college for two years, and was not associated with Agency Holding Corporation (Ohio) in any way. As of February, 1978 she was not associated with Agency Holding Corporation (Illinois) or Ehrman Ratini Oglevee & Craig in any way.

49. No causal link exists between any act or agreement of Diane Pariano and legally actionable injury alleged by plaintiff.

50. The only injury alleged in the Complaint to have been caused by the wrongful activity of the defendants for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

51. The law does not provide a remedy or recognize as injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

52. There are no genuine issues of material fact and Diane Pariano is entitled to judgment as a matter of law on Counts 1 through 6 of plaintiff's Complaint.

Dated: July 29, 1982

THORP, REED & ARMSTRONG

/s/ John H. Bingler, Jr.
John H. Bingler, Jr.

/s/ Glenn E. Bost, II
Glenn E. Bost, II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,
a corporation,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

ATTACHMENTS TO
MOTION FOR SUMMARY JUDGMENT

Affidavit of Kerry Patrick Craig ..... A

Affidavit of Robert C. Oglevee ..... B

Affidavit of Diane Pariano Craig C

Transcript before the Honorable
John D. Flaherty, Jr. J.
(Court of Common Pleas of
Allegheny County—February 15 and 16, 1978) ..... D

(Testimony omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Kerry Patrick Craig, having been sworn says:

1. I am the President and sole shareholder of Agency Holding Company (Illinois), the General Agency for Crown Life Insurance Company ("Crown") for the State of Illinois. I have been President of Agency Holding Company (Illinois) since September, 1977. Prior to becoming President of Agency Holding Company (Illinois), I was an employee in the home office of Crown Life Insurance Company ("Crown") in Toronto. My immediate supervisor at Crown was Art Thomas, an Agency Vice President, responsible for certain of the General Agencies in the United States inclding the Pittsburgh General Agency of Malley-Duff & Associates, Inc. ("Malley-Duff"). Mr. Thomas' immediate supervisor was Clarke

Lloyd, the Senior Agency Vice President of Crown for the United States. I am familiar with the facts set forth in this affidavit, which I make in support of Denfendants' Motion for Summary Judgment.

2. In 1977, I was employed as an Agency Supervisor in Crown's Agency Department. In this capacity, I had occasion to periodically visit the Malley-Duff General Agency in Pittsburgh. In early August 1977, Clarke Lloyd and I met with Thomas Malley and James Duff, the owners of Malley-Duff in Pittsburgh in early August, 1977 concerning the inadequate sales production performance of Malley-Duff and the imposition on Malley-Duff of a sales production standard for 1977. I also became familiar with the reasons for the imposition of the standard and the manner in which it was imposed. It was discussed with Messrs. Malley and Duff at the August 1977 meeting in Pittsburgh and was officially communicated to them by letter from Clarke Lloyd dated August 19, 1977. A copy is attached as "Exhibit A". The production standard called for a sales level of $7.5 million "Ordinary Net Paid". The Malley-Duff sales production had not been satisfactory for a number of years. Messrs. Malley and Duff had been told many times about this. The imposition of a production standard was a last resort. The August 1977 meeting was prompted by the January-June sales production figures of Malley-Duff which showed that Malley-Duff's performance was continuing to be unsatisfactory.

3. The production standard imposed on Malley-Duff for the year 1977 was lower than the production achieved by Malley-Duff in the years 1970, 1971, 1972 and 1975.

4. Crown had been setting sales production standards for many years for General Agencies who were not doing an adequate job in Crown's view. This gave the General Agencies and Crown a standard of performance Crown would find acceptable. A General Agency would be told it needed to achieve a certain amount of sales production or Crown would have to find someone else to handle the market. The standard is set at a certain percentage of the total market in the General Agency's geographic area.

5. On October 4, 1977, Clarke Lloyd again wrote to Messrs. Malley and Duff and urged them "to put forth every effort to avoid termination of [their] contract for lack of production at the beginning of 1978." This letter was prompted by a review of Malley-Duff's sales production figures for January-September, 1977 which showed that Malley-Duff wasn't doing anything in the marketplace.

6. Malley-Duff operated as General Agency of Crown under General Agency Agreements amended and entered into periodically as products or commission rates were changed. Paragraph 30 of these Agreements provided:

> This Agreement may be terminated on one month's notice by either party and such notice will be deemed to have been given when a registered letter containing the notice is mailed addressed to the party entitled to the notice at the party's last known address.

7. When Malley-Duff failed to meet the production standard set forth in the August 19, 1977 letter, Crown exercised its right under paragraph 30 and terminated Malley-Duff on one month's notice by letter dated January 11, 1978 effective February 10, 1978. A copy of this

letter is attached as "Exhibit B". Malley-Duff produced in 1977 approximately $5.5 million in "Ordinary Net Paid".

8. Even after termination, Malley-Duff was entitled under its agreement with Crown to receive vested renewal commissions on premiums paid on policies solicited by Malley-Duff prior to termination. Since termination, the renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

9. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ Kerry Patrick Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ Arthur R. O'Brien
Notary Public

My Commission Expires:
October 28, 1984

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Diane Pariano Craig, having been sworn, says:

1. I am presently Mrs. Kerry Patrick Craig. Kerry and I were married on April 16, 1982. From July 13, 1977, to June 30, 1978, I was employed as a secretary in the one secretary office of Agency Holding Corporation (Ohio) in Cleveland. I was at the time 19 and 20 years old. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion For Summary Judgment.

2. After I graduated from Fairview Park High School in Fairview Park, Ohio, a suburb of Cleveland, in 1975, I attended college for two years until May 1977. During this period, I was not associated with Agency Holding Corporation (Ohio) in any way.

3. In June 1977, I began looking for a job and on July 13, 1977, was hired by Edward J. Horning to work as the secretary for Agency Holding Corporation.

4. On February 13, 1978, in Pittsburgh I learned for the first time that Malley-Duff & Associates, Inc. ("Malley-Duff") had been terminated as General Agent in Pittsburgh. I had never heard of Malley-Duff prior to that date. Robert Oglevee, my boss at Agency Holding Corporation (Ohio), asked me to help Crown organize the Malley-Duff records which had been turned over to Crown in Pittsburgh at or shortly after the termination.

5. I did not participate in any way in any acts, agreements, discussions or anything else that had to do with the setting of a production standard for Malley-Duff or the decision to terminate or the termination of Malley-Duff.

6. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ Diane Pariano Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ Arthur R. O'Brien
Notary Public

My Commission Expires: October 25, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Robert C. Oglevee, having been sworn, says:

1. I am the President and sole shareholder of R. C. Oglevee & Assoc., Inc., the General Agency for Crown Life Insurance Company ("Crown") for the Pittsburgh area. I have been President of R. C. Oglevee & Assoc., Inc. or Secretary of its predecessor Ehrman, Ratini, Oglevee & Craig, Inc. since 1978. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' motion for Summary Judgment.

2. Even after the termination of its General Agency Agreement, Malley-Duff was entitled under its Agreement to receive vested renewal commissions on premiums paid on policies solicited through Malley-Duff prior to termi-

nation. Since termination, the renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

3. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ Robert C. Oglevee

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ Mary Caivano
Notary Public

My Commission Expires:

CROWN
LIFE INSURANCE COMPANY • 120 BLOOR
STREET EAST
• TORONTO • CANADA • M4W 1B8

August 19th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

This letter will confirm our conversation regarding the Company's attempts to increase our share of the Pittsburgh market.

As you know, the Agency was incorporated in 1954 and is one of the older agencies within the Company. It started as Young, Malley & Kekich and shortly after the original agency was formed the three partners decided to break up and Mr. Young left the business, Mr. Kekich organized his own agency and Mr. Malley organized his own agency. The Kekich Agency and the Malley Agency operated as personal producing agents for some time with unspectacular results.

In 1967 and 1968 we suggested that Mr. Malley find a partner who would help develop the business on a more productive basis and in 1968 he was joined by Mr. Duff. From 1969, 1970, 1971 and 1972 the Agency started to develop at a reasonable pace; in 1968 winning the Crown Life Cup and in 1974 winning the Director of Agencies Trophy. However, from 1972 to the current period the flow of Ordinary business has been erratic and the current position of the Agency at June, 1977 both in Ordinary and Group is extremely disappointing and the prognosis for the Agency is not encouraging, particularly on the Individual side.

The number of active producing brokers is reducing and not encouraging as far as future development is concerned. It is the oldest agency in the State of Pennsylvania as far as continuing management is concerned, but its growth has not been consistent and is certainly less now than it was in the late sixties. More importantly, in comparing the effective job that Pittsburgh East End is doing in its market, and comparing it to new agencies in Pennsylvania, it is not maintaining a preeminent position as it should both due to the age and maturity of the agency and the market that it is serving.

For example, the Erie Agency in a very small community has a much more substantial paid for business for the first six months of June, 1977, as does Philadelphia, as does Pittsburgh Center, a personal producing agency in Pittsburgh. Harrisburg, a new agency, has more than half a million paid for as does Allentown another new agency in Pennsylvania.

Obviously, Allentown, Harrisburg and Erie do not have the extra support of a Group Office in their immediate territory and there is a good deal of evidence to indicate that a Group office has a synergistic effect on the production of an agency, bringing it up to the top level.

All of the foregoing is to indicate that the Agency is not fulfilling its marketing function and as a result we have decided to take three direct steps to increase our position in the market.

We will actively seek a new general agency for Pittsburgh or, alternatively, study the market penetration potential of the Jules Ehrman Agency.

We will agree to maintain the Malley Duff Agency if the following standards are met: An Ordinary Net Paid level (including Individual Health) at December, 1977 of $7,500,000; an Ordinary and Individual Health Net Paid Score in December, 1978 of $10,000,000; an Ordinary and Individual Health Net Paid Score at the end of December, 1979 of $15,000,000 and an Ordinary and Individual Health combined Net Paid level at the end of 1980 of $20,000,000. And that this level is maintained and that the Agency because of age and market remains in the top 25% of the company's agencies serving the United States.

The above levels of performance should be maintained under the current market conditions. If the market conditions substantially change so as to effect the agency's operations over which the agency and agency personnel have no control, adjustments to these standards would be made.

I am setting these conditions forth to give you our views at this time and to clearly understand the objectives that we all have in mind.

Kind personal regards.

Sincerely,

C. B. LLOYD

C.B. Lloyd:yj

Senior Agency Vice-President
for the United States

CROWN
LIFE INSURANCE COMPANY • 120 BLOOR
STREET EAST
• TORONTO • CANADA • M4W 1B8

October 4th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

In reviewing the 15th September Production Summary I note that in September, 1976 the Net Settled Issues Ordinary totalled $2,692,059 and the Net Paid for the same period was $2,892,799. At September, 1977 the Net Settled Issues were $3,049,929 and the Net Paid Ordinary for the same period $3,204,500. The total Net Paid including Indi-

vidual Disability and Group at the 15th September, 1976 was $3,685,651 and the Net Paid in September, 1976 was $3,886,505. The Net Settled Issues for the same period by September 15th, 1977 had reduced to $3,273,509 and the Net Paid by September, 1977 was $3,554,250.

The potential net Paid for the current year is $147,000 and it is at this point very difficult to see how the agency can reach the reasonable quotas that we discussed previously. I strongly urge you to put forth every effort to avoid the termination of your contract for lack of production at the beginning of 1978.

Kind personal regards.

Sincerely,

C. B. Lloyd
Senior Agency Vice-President
for the United States

C.B. Lloyd:yj

c.c. Mr. M. B. Hutchison

CROWN
LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

REGISTERED

January 11th, 1978

air mail

Malley-Duff & Associates Inc.
Crown Life Insurance Company,
Liberty Building,
6101 Penn Mall
Pittsburgh, Pennsylvania 15206

Attention: Mr. James A. Duff Jr.
Mr. Thomas E. Malley

Dear Sirs:

The Company hereby gives notice of termination pursuant to Provision 30 of your General Agency Agreement which took effect September 1st, 1977.

Termination becomes effective one month from the date of mailing of this letter.

Your truly,

D. O'SULLIVAN

D. O'Sullivan,
Assistant Superintendent,
Agency Administration.

DO:lc

Malley-Duff Net Paid History

	Pittsburgh East End	West Virginia	Total Malley-Duff
1962 Malley	64,478		64,478
63	986,754		986,754
64	1,115,385		1,115,385
65 Malley & Assoc.	914,431		914,431
66	1,096,175		1,096,175
67 Malley-Duff	1,800,000		1,800,000
68	3,479,298		3,479,298
69	4,959,657	1,068,500	6,028,157
70	6,908,512	4,883,750	11,792,262
71	7,325,867	1,071,760	8,397,627
72	7,983,144	3,844,848	11,827,992
73	5,473,671	2,407,117	7,880,788
74	6,726,303	2,849,171	9,575,474
75	8,288,944 sold to	(2,468,111)	8,288,944
76	5,176,478 Dupay	(7,347,069)	5,176,478
77	5,518,155	(2,364,337)	5,518,155

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

JOINDER IN MOTION FOR SUMMARY JUDGMENT AND ADOPTION OF BRIEF IN SUPPORT THEREOF

Crown Life Insurance Company and Clarke Burton Lloyd, by their attorneys, hereby adopt by reference the Motion for Summary Judgment filed in Civil Action No. 81-439 by Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), Ehrman Ratini Oglevee & Craig, Kerry Patrick Craig, Robert Oglevee and Diane Pariano and adopt the brief filed in support thereof.

Date: July 29, 1982

/s/ Alexander Black

/s/ Ramona J. Rokoshi

/s/ Robt W. Brown

/s/ Buchanan Ingersoll Rodewald Kyle & Buerger

Attorneys for Crown Life Insurance Company and Clarke Burton Lloyd, Defendant

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY DUFF ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARK BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual

Defendants.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff brings this suit to recover damages allegedly incurred as the result of (1) defendants' violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (hereinafter referred to as "RICO"), (2) defendants' violation of plaintiff's civil rights under 42 U.S.C. § 1985(2), and (3) a civil conspiracy by the defendants to interfere with plaintiff's rights. Defendants have moved for summary judgment, which this Court will grant.

I. RICO Counts

In Counts 1 through 4, the plaintiff asserts violations of RICO, which provides civil remedies in the form of treble damages for "[a]ny person injured in his business or

property by reason of a violation." 18 U.S.C. § 1964(c). The word "person" includes the plaintiff corporation. 18 U.S.C. § 1961.

Plaintiff contends that defendants Lloyd, Craig and Crown Life Insurance Company (hereinafter referred to as "Crown") associated themselves as an enterprise for the purpose of taking over various Crown insurance agencies that had lucrative territories in the United States. (Complaint, ¶18). Plaintiff alleges that defendants used mail and wire communications and travel in interstate and foreign commerce to accomplish their goal. The takeover scheme consisted of the setting in 1977 of a sham production quota too high to be met and the seizing of the agency by defendants in 1978 when it failed to meet the quota. These allegations also form the basis of a complaint filed on April 5, 1978, at Civil Action No. 78-373 (hereinafter referred to as the "1978 lawsuit").

Plaintiff further alleges that the defendants obstructed justice by intentionally interfering with plaintiff's prosecution of the 1978 lawsuit. Specifically, plaintiff charges the defendants with (1) destruction of evidence, (2) circulation of false and defamatory information to the media about the judge who was originally assigned to the 1978 suit, (3) subornation of perjury, (4) tampering with a witness, (5) perjury, and (6) observation of a U.S. Marshal in the performance of his duties.

The injuries alleged by plaintiff fall into two categories: (1) business injuries which are alleged in the 1978 lawsuit, and (2) injuries caused by defendants' obstruction of justice. Defendants move for summary judgment on the ground that any claim for injuries to the business is beyond

the statute of limitations, and any claim for injuries caused by the obstruction of justice falls outside the scope of RICO, or alternatively, is barred by the statute of limitations.

A. Business Injuries: Statute of Limitations

The parties agree that suits under RICO are governed by the limitations period of the most analogous cause of action under Pennsylvania law. (Defendants' brief, p. 9; plaintiff's brief, p. 86). Plaintiff argues, and this Court agrees, that the RICO claims for business injuries set forth in Counts 1 through 4 are most analogous to a common law fraud action in Pennsylvania. (Plaintiff's brief, p. 90). However, this Court disagrees with plaintiff's conclusion that the applicable statute of limitations for fraud actions is six years.

The plaintiff cites *Sharp v. Coopers & Lybrand,* 649 F.2d 175, 191-192 (3d Cir. 1981), *cert. denied,* 455 U.S. 938 (1982), for the proposition that fraud "falls within the catch-all provision of Pennsylvania's six-year statute of limitations." (Plaintiff's brief, p. 90). Clearly, that is *not* the holding in the *Sharp* case. The plaintiff filed suit on May 4, 1975, in the *Sharp* case. The applicable statute of limitations was six years at the time the suit was commenced in *Sharp.* Pa.Stat.Ann. Tit. 12, § 31 (Purdon 1953). This statute has since been repealed and replaced by 42 Pa.C.S.A. §§ 5521-5536 (1978). In holding that the six-year statute of limitations for common law fraud applied in *Sharp,* the Court cited its previous holding in *Biggans v. Bache Halsey Stuart Shields, Inc.,* 638 F.2d 605 (3d Cir. 1980). The Court noted in *Biggans* that, since June 27, 1978, the date on which the Judicial Code estab-

lishing a new limitations scheme became effective, it has been unclear whether the two-year period under § 5524(3) or the six-year catch-all provision under § 5527(6) applies to common law fraud actions. *Biggans,* 638 F.2d at 607 n. 2. The Court did not resolve the issue in *Biggans* because the plaintiff had filed suit prior to the effective date of the Judicial Code. Plaintiff filed suit in this action on March 20, 1981; the Judicial Code clearly applies to plaintiff's action.

Two courts have addressed the question of which limitation period applies. In *Bickell v. Stein,* 291 Pa. Super. 145, 435 A.2d 610 (1981), the Pennsylvania Superior Court upheld a lower court's dismissal of an action alleging fraud and interference with contractual relations on the ground that the action "was not commenced within the two-year period provided by the *applicable* statute, 42 Pa.C.S.A. § 5524(3) and (4)." *Id.* at 149, 435 A.2d at 612[1] (emphasis added). In *Fickinger v. C. I. Planning Corp.,* 556 F. Supp. 434 (E.D. Pa. 1982), Judge Shapiro reviewed the legislative policy behind revision of the statutes of limitation in Pennsylvania and concluded that the two-year period set forth in 42 Pa.C.S.A. § 5524(3) controls. This Court agrees that the two-year period is applicable to common law fraud actions.

Although the start of the statutory limitation may be delayed by plaintiff's ignorance of the injury and its operative cause, *Bickel,* 291 Pa. Super. at 149-150; 435 A.2d at

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[1]42 Pa.C.S.A. § 5524(3) provides that "[a] action for taking, detaining or injuring personal property, including actions for specific recovery thereof" must be commenced within two years.

612, plaintiff clearly cannot plead such ignorance as to its business injuries. As stated previously, the plaintiff pleaded fraudulent termination of the agency by use of a sham production quota in a case filed in 1978. Thus, the claim for injury to the business through termination and loss of vested renewal premiums is clearly barred by the statute of limitations.

B. Injuries Cause by Interference with Lawsuit:

Scope of RICO

With respect to the claim for injuries caused by obstruction of justice through intentional interference with plaintiff's prosecution of the lawsuit, defendants argue that such injuries do not fall within the scope of RICO. Plaintiff seeks recovery under 18 U.S.C. § 1964(c), which provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Counts 1 through 4 incorporate allegations that the defendants violated subsections (d), (c), (b), and (a) of § 1962, respectively.

The issue is whether interference with plaintiff's 1978 lawsuit is an injury to the plaintiff's "business or property" within the meaning of RICO. This Court agrees with the analysis of District Judge Garrity in *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136-1137 (D. Mass. 1982):

> [Section 1964(c)] extends a treble damage remedy to any person injured in "business or property" by a violation of § 1962. Little legislative history exists on the clause. But courts which have recently considered § 1964(c) have interpreted it narrowly . . . They have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts . . . Just as in the antitrust context the Supreme Court has held that the Clayton Act's treble damage provisions are available to remedy only "injury of the type the antitrust laws were intended to prevent," . . . so, too, § 1964(c) addresses only a specific sort of injury arising out of racketeering . . . Indeed, it is telling that whereas RICO's other criminal and civil penalties apply generally to violations of § 1962, the remedy which § 1964(c) prescribes extends only to persons who suffer a specific injury, viz., to their business or property.
>
> • • •
>
> The cases in which courts held that plaintiffs have, or but for some other defect could have, stated a claim under § 1964(c) have involved business persons engaged in conventional commercial activity who allegedly suffered commercial injury.
>
> • • •
>
> To be sure RICO uses the disjunctive in referring to "business or property." Yet we believe that phrase must be read with the statute's primary purpose—to protect legitimate businesses from infiltration by racketeers—in mind . . . [W]e believe courts should confine § 1964(c) to business loss from racketeering injuries.

(Citations omitted). *See also Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir. 1982).

The injury suffered by plaintiffs as the result of interference by the defendants with its 1978 lawsuit is not a business injury within the meaning of RICO. Furthermore, there are sound policy reasons for construing the statute as not permitting plaintiff to file a separate suit under RICO for injuries which allegedly resulted from defendants' obstruction of justice in its 1978 lawsuit. For the same reasons that no cause of action is available to a party who alleges that perjured testimony in a prior case caused him injury, no separate civil cause of action under RICO should be permitted for opprobrious conduct during the litigation of a single case. There are other remedies available to plaintiff for such wrongs; e.g., discovery, sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's "property." An enormous multiplicity of suits could result from holding otherwise.

II. Section 1985(2) Claim

In Count 5, plaintiff alleges that defendants Lloyd, Craig, Crown, Pariano, Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio "formed a conspiracy to obstruct justice and to violate plaintiff's civil rights in connection with the [1978 lawsuit]." (Complaint, ¶ 34). Plaintiff alleges the following acts were committed by the defendants in furtherance of the conspiracy: (1) the hiring of a private investigator to follow the judge who was initially assigned to this case in an effort to find a basis for seeking his recusal; (2) the hiring of a private investigator to follow plaintiff's counsel "to intimidate

plaintiff's counsel with respect to his representation of plaintiff in the [1978 lawsuit]"; (3) threats and intimidation of witnesses and an attempt to prevent them from testifying; (4) destruction of relevant documents in the 1978 lawsuit, and (5) subordination of perjury. In paragraph 39 of the complaint, plaintiff alleges that such acts "constitute a conspiracy to deter, by intimidation and threat, Plaintiff and witnesses in the [1978 lawsuit] from prosecuting that action and from testifying therein in violation of 42 U.S.C. § 1985." Defendants move for dismissal on several grounds: (1) the plaintiff's failure to allege class-based animus; (2) plaintiff's failure to allege a cause of action under § 1985(2); (3) the lack of cognizable injury under § 1985; and (4) the statute of limitations.

Although plaintiff does not specifically state whether it is proceeding under the first or second clause of § 1985 (2), the language of paragraph 39 closely tracks the first clause. Furthermore, no cause of action would lie under the second clause of § 1985(2) because the Supreme Court has clearly stated that the second clause "applies to conspiracies to obstruct the course of justice in state courts." *Kush v. Rutledge*, — U.S. —, 103 S. Ct. —, 75 L.Ed.2d 413, 419 (1983). Also, the Court implied that a cause of action under the second clause, unlike a cause of action under the first clause, would require a showing of class-based, invidiously discriminatory animus. *Id.* Since plaintiff did not allege interference with a state court proceeding nor class-based discriminatory animus, the Court concludes that no cause of action has been alleged under the second clause of § 1985(2). *See Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

The first clause of § 1985(2) provides as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . .

In *Brawer v. Horowitz,* 535 F.2d 830 (3d Cir. 1976), the Third Circuit upheld the dismissal of a complaint for failure to state a cause of action under § 1985(2) brought by two persons convicted of transporting stolen United States treasury bills. The plaintiffs had alleged that the prosecuting attorney conspired with a co-defendant who pled guilty "to secure the convictions of plaintiffs with the knowing use of false and perjured testimony." *Id.* at 832. The Third Circuit reasoned that, although such an allegation could be construed as stating a cause of action under the first clause of § 1985(2) which prohibits "conspir[ing] to . . . influence the verdict . . . or indictment of [the] grand or petit juror[s]," such a construction would be "impermissibly generous." *Id.* at 840. Instead, the Third Circuit concluded that the first clause of § 1985(2) "concern[s] itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses, or grand or petit jurors."

Using this analysis as a guide, the Court will now scrutinize plaintiff's allegations in Count 5. Four of

plaintiff's allegations clearly fall outside the scope of § 1985(2): intimidation of the presiding Judge, intimidation of plaintiff's counsel, destruction of relevant evidence, and subornation of perjury. The allegation that plaintiff's witnesses were intimidated, however, requires closer examination. Defendants raise two specific arguments with respect to these allegations: (1) only the person deterred from attending or testifying in court, or injured as a result of attending or testifying in court, may bring an action; and (2) alternatively, § 1985(2) does not apply to prosecution of an action, but rather to actual attendance or testimony in court. Plaintiff has not alleged injury on account of the failure of a witness to appear in court or the presentation of false testimony in court as a result of defendants' actions.

Defendants' first argument, that only the person deterred has standing, has been addressed by two district courts. In *Burch v. Snider,* 461 F.Supp. 598, 600 (D. Md. 1978), Chief Judge Northrop held that the language of § 1985(2) "creates a cause of action for 'parties' only insofar as they are themselves deterred from or injured on account of testifying or attending federal court. The plain words of the statute do not give parties a right to sue based on intimidation of their witnesses." In *Kelly v. Foreman,* 384 F. Supp. 1352, 1353 (S.D. Texas 1964), District Judge Singleton focused instead upon the remedial language of the statute. Section 1985(3) provides as follows:

> In any case of conspiracy set forth in [§ 1985], if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person

> or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Judge Singleton held that the statute clearly creates a cause of action for any person injured in the course of the alleged conspiracy. This interpretation better serves the effectuation of § 1985's purposes. In almost every case, it will be the *party* who suffers injury as a result of the intimidation of witnesses. What damages can the *witness* who was deterred from testifying claim? Thus, this Court concludes that a party may claim injury based on the intimidation of his witnesses.

Defendants' second argument, that § 1985 does not apply to prosecution of an action, was addressed by the Fifth Circuit Court of Appeals *en banc* in *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (1981). The Fifth Circuit upheld a summary judgment in favor of an employer where plaintiffs claimed that they were fired as a result of filing workmen's compensation claims. In reaching its decision, the Fifth Circuit made the following comments regarding § 1985(2):

> Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality . . ." In light of the acts of violence that threatened the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in

> federal court . . . [Section 1985] was intended to protect against direct violations of a party or witness's right to attend or testify in federal court. This clear congressional purpose is best served by construing the statutory language in its ordinary meaning so that only direct interference with a federal court if prohibited.

Id. at 348 (citations omitted); *cf. Keating v. Carey*, 706 F.2d 377, 386 n. 13 (2nd Cir. 1983).

In order for plaintiff to establish a cause of action under § 1985(2), plaintiff must show that an act in furtherance of the object of the conspiracy caused injury to the plaintiff through direct interference with a federal court. Thus, the plaintiff must allege injury occasioned by (1) a conspiracy to deter plaintiff from attending or testifying truthfully, or (2) deterrence of one of plaintiff's witnesses which resulted in the witness's failure to attend court or to testify in court truthfully, with plaintiff's consequent loss of court action or diminshment of recovery, or (3) injury to the plaintiff on account of having attended court or having testified in the 1978 lawsuit. Plaintiff claims as its injuries expenses and delays in the pretrial stages of its 1978 lawsuit and the suppression of relevant and material evidence during the discovery phase of that action.[2]

---

[2]Since the filing of this complaint, plaintiff has tried and won its 1978 lawsuit, though an appeal is pending. Plaintiff has not sought to amend its complaint to allege that any witness failed to appear or to testify truthfully in the trial of that suit as a result of defendants' actions, nor has the plaintiff submitted any affidavit, claiming such an injury, subsequent to the trial of the 1978 lawsuit. The fact that plaintiff won its 1978 lawsuit

(Continued on following page)

(Complaint, ¶40). Thus, plaintiff has failed to allege a cognizable injury under § 1985(2).[3]

III. Civil Conspiracy

In Count 6, plaintiff alleges a civil conspiracy at common law. With the dismissal of Counts 1 through 5, there remains no basis for the exercise of federal jurisdiction. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

An appropriate Order will be issued.

/s/ Alan N. Bloch

Date: March 23, 1984

cc: Counsel of record.

(Continued from previous page)

despite defendants' obstructions of justice (assumed to be true for purposes of this motion) reaffirms the need to limit § 1985(2) to direct interferences with federal court. Perhaps plaintiff's witnesses were *not* deterred from appearing *in court* or testifying truthfully *in court:* that is the only injury § 1985(2) is intended to remedy. Furthermore, it does not make sense to allow recovery for pretrial obstructions of justice in a case which plaintiff may eventually win, in part, through effective use of inferences to be drawn from those same obstructions of justice.

[3]Obviously, by this reasoning, plaintiff's cause of action for intimidation of anyone other than plaintiff cannot arise prior to trial of the action. If the Court has erred and plaintiff does indeed have a cause of action for expenses and delays occasioned by defendants' deterrence of plaintiff's witnesses at the pretrial stage, then the plaintiff's action may yet be barred by the statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARKE BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual,

Defendants.

JUDGMENT ORDER

AND NOW, this 23rd day of March, 1984, upon consideration of the Motion for Summary Judgment filed by all Defendants on July 29, 1982,

IT IS HEREBY ORDERED that said Motion is GRANTED and that judgment be, hereby is, entered in favor of Defendants and against Plaintiff.

/s/ Alan N. Bloch
United States District Judge

cc: H. Woodruff Turner and
David Borkovic, Esquires
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Pittsburgh, PA 15219
Alexander Black, Esquire
57th Floor, U.S. Steel Building
Pittsburgh, PA 15219
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8th Floor, One Riverfront Center
Pittsburgh, PA 15222

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.

Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK CRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania Corporation
ROBERT OGLEVEE, individual

On Appeal from the United States
District Court for the Western
District of Pennsylvania

(D.C. Civ. No. 81-439)

Argued: November 19, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges.*

(Filed May 30, 1986)

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P.O. Box 2009
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Attorney for amicus curiae
Congress Financial Corp.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final summary judgement of the district court dismissing the complaint of appellant Malley-Duff & Associates, Inc. ("Malley-Duff"). For the reasons that follow, we will reverse and remand for further proceedings.

I.

Until February 13, 1978, Malley-Duff was an agent of defendant Crown Life Insurance Company ("Crown Life") for a territory surrounding and including Pittsburgh, Pennsylvania. Crown Life required Malley-Duff to represent it exclusively. Malley-Duff alleges that defendants formed an "enterprise," the purpose of which was "to acquire, take over or eliminate various Crown agencies that had lucrative territories in the United States of America," and which did so by "false and fraudulent means and pretenses." The enterprise allegedly acquired Malley-Duff's agency by first imposing, nine months into the fiscal year 1977, a "bogus" production quota that could not be met, and then terminating the agency when it in fact failed to meet the quota. According to the complaint, the enterprise used similar means to acquire Crown Life agencies in Chicago, Peoria, Cleveland, Newark, Hartford, Denver, and elsewhere. It is further alleged that terminated agents were defrauded out of renewal commissions.

In April of 1978, Malley-Duff filed suit (*"Malley-Duff I"*) against defendants Crown Life, Lloyd, Craig, Agency Holding Company (Illinois), and Agency Holding Company (Ohio), as well as another individual not named in this suit, alleging violations of the federal antitrust laws and conspiracy to tortiously interfere with contract. The case was tried to a jury, but defendants won a directed verdict on the antitrust claims at the close of Malley-Duff's case. Malley-Duff won a verdict of $900,000 on the state conspiracy claim, but the jury concluded in answer to a special interrogatory that there was no tortious interference. On appeal, this court ordered a new trial, holding that there was sufficient evidence of a violation of § 1 of the Sherman Act to present a jury issue, and "that the verdict from answers on the remaining state law claims were inconsistent." *Malley-Duff & Associates v. Crown Life Insurance Company*, 734 F.2d 133, 136 (3d Cir.), *cert. denied*, 105 S. Ct. 564 (1984).

On March 20, 1981—prior to trial of *Malley-Duff I*—Malley-Duff filed the instant complaint, alleging causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982),[1]

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[1]18 U.S.C.§ 1964(c) creates a private cause of action:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962 outlaws (a) the use of income derived from "a pattern of racketeering activity" or through the collection of an "unlawful debt" (defined at 18 U.S.C. § 1961(6)) to acquire an interest in or establish an enterprise engaged in or affecting

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for conspiracy to interfere with civil rights, 42 U.S.C. § 1985,[2] and a pendent state civil conspiracy theory. The RICO claims can be divided into two categories: (1) claims arising out of the allegedly fraudulent termination of the agency;[3] and (2) claims arising out of alleged obstructions

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interstate commerce, (b) the acquisition or maintenance of any interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt, (c) conducting or participating in the conduct of an enterprise through a pattern of racketeering activity or collection of unlawful debt, and (d) conspiring to violate any of these provisions. Malley-Duff's complaint contained counts based on each of the four subsections.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1) as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, any "offense" involving bankruptcy or securities fraud, and drug-related activity that is "punishable" under federal law.

A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

[2]This section provides in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[3]The complaint relies on multiple violations of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to establish the necessary element of a "pattern of racketeering activity."

of justice by defendants in the course of the discovery phase of *Malley-Duff I*.[4] The § 1985 claims were based on the same allegedly obstructive conduct. The civil conspiracy count incorporated allegations involving both the termination and the obstructions of justice.

This case was consolidated with *Malley-Duff I* on November 2, 1981, but was severed on January 11, 1983, prior to trial. Defendants had filed a motion for summary judgmement on July 29, 1982. On March 23, 1984, the district court granted defendants' motion and entered judgement for them on all counts. This appeal followed.[5]

II.

The district court dismissed Malley-Duff's RICO claims, to the extent they arose out of the allegedly fraudulent termination of its agency, on the ground that they were barred by the applicable statute of limitations. Because federal law does not provide a statute of limitations for civil RICO actions, the district court followed the settled practice of turning to the law of the forum state (in this case Pennsylvania) to "borrow" the limitations period for the state cause of action most closely analogous

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[4]These allegations invoke 18 U.S.C. § 1503 (obstruction of justice), another RICO "predicate act." Specifically, the complaint alleges subordination of perjury, destruction of documents, interference with a United States Marshal, perjury, witness intimidation, and an attempt to blackmail the district judge originally assigned to *Malley-Duff I*.

[5]This appeal was initially listed for disposition on December 7, 1984, but was removed from the list for the purpose of supplemental briefing on issues raised by Sedima, S.P.R.L. v. Inmrex Co., — U.S. —, 105 S. Ct. 3275 (1985) and Wilson v. Garcia, — U.S. —, 105 S. Ct. 1938 (1985).

to Malley-Duff's claims.[6] *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462-63 (1975); *see generally* Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127 (1979). The parties agreed that common law fraud was the state cause most analogous to these claims, but disagreed as to whether a two- or six-year limitations period governed such actions in Pennsylvania.[7] The district court held that the two-year statute applied, and that

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[6]As the late Judge Henry Friendly once wrote:

> It has also been long established that when Congress created a federal right but did not prescribe a period for its enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits. . . . The basis of this was that Congress could not have intended an unlimited period for enforecement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation statutes of the states where they sit.

Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

[7]There is no dispute that, prior to 1978, fraud actions were governed by a six-year statute, and that 1982 amendments to the Pennsylvania Judicial Code make it clear that such actions are now subject to a two-year limitation. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1985). The question of which period applied during the intervening period, when this action was filed, has been the subject of considerable litigation. *See, e.g.*, Vosbikian v. Wasserstrom, No. 84-4674 (E.D. Pa. 1985) (available on LEXIS, Genfed library, Dist file) (six years); Bernicker v. Pratt, 595 F. Supp. 1034 (E.D. Pa. 1984) (six years); Ferber v. Morgan Stanley Co., CCH Fed. Sec. L. Rep. ¶ 99,634 (E.D. Pa. 1984) (two years); Fickinger v. C-1 Planning, Inc., 556 F. Supp. 434 (E.D. Pa. 1982) (two years); Culbreath v. Simone, 511 F. Supp. 906 (E.D. Pa. 1981) (six years). *See also* Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851, 855-56 n.26 (1980) (six years). Because we decline to use the fraud analogy, *infra*, we need not reach this issue.

claims filed on March 20, 1981, relating to events that occurred in early 1978,[8] were therefore, time-barred.

Subsequent to the district court's decision, the Supreme Court of the United States decided *Wilson v. Garcia*, — U.S. —, 105 S. Ct. 1938 (1985), which established a three-part inquiry[9] to guide the selection of the statute of limitations that will govern a federal claim. First, we must determine whether it is state or federal law that controls the characterization of the claim. Second, we must decide whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Finally, "we must characterize the essence of the claim in the pending case, and decide which state statute provides that most appropriate limiting principle." 105 S. Ct. at 1943. In the subsections that follow we engage in the prescribed inquiry.[10]

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[8]A large part of the briefing and argument in this matter has been devoted to the difficult issue of when the RICO claims accrued. This relates to Malley-Duff's contention that even if a two-year limit applies, its claims are timely. Because we adopt a six-year period, *infra*, and it is clear that all conduct complained of occurred within that period, we do not reach the accrual issue.

[9]The Court cited no precedent for the three-part inquiry, and its origins are unclear. 105 S. Ct. at 1943. There is nothing in the opinion, however, that would suggest that the approach is unique to § 1983 cases. Indeed, it appears to us that the Court intended to mark out a general approach to all statute of limitations borrowing problems.

[10]This court has held in two cases that *Wilson v. Garcia* should be applied retroactively in § 1983 cases. *See* Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir.), *cert. denied*, 105 S. Ct.

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Our function here is to legislate interstitially, and in doing so we are mindful of Justice Holmes, admonition that we are "confined from molar to molecular motions." *Southern Pacific Co. v. Jenson*, 244 U.S. 205, 221 (1917) (dissent). We conclude that within each state all civil RICO claims should be characterized uniformly, in accordance with federal law, and that in Pennsylvania the most appropriate limitations period for all civil RICO claims is the six-year residual statute of limitations.

A. Controlling Law

In *Wilson v. Garcia*, which arose in New Mexico, the question whether state or federal law controlled the characterization of § 1983 claims was critical because the Supreme Court of New Mexico had definitively decided, as a matter of state law, that § 1983 claims should be analogized for limitations purposes to state claims brought under the New Mexico Torts Claim Act. *DeVargas v. New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982). The United States Supreme Court held that *DeVargas* was not binding on federal courts. The Court noted that the "characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress'

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349 (1985); Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985). In Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), we applied *Wilson v. Garcia* retroactively to a claim brought under 42 U.S.C. § 1981. These results followed from the uncertainty that existed with regard to the applicable limitations period under Pennsylvania law prior to these cases, making it not inequitable to apply *Wilson* retroactively. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Given the even greater uncertainty that has existed with regard to the applicable limitations period in this case, *see also* footnote 7 *supra*, *Wilson v. Garcia* should, *a fortiori*, apply here.

purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of [42 U.S.C.] § 1988 directs that the matter of characterization should be treated as a federal question." 105 S. Ct. at 1943. The court found further support in § 1988's[11] instruction that state law shall apply "so far as the same is not inconsistent with" federal law, observing that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." 105 S. Ct. at 1944. In addition, the Court stated, "[i]n borrowing statutes of limitations for other federal claims, this Court has generally recognized that the problem of characterization 'is ultimately a question of federal law.' " *Id.* (quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966)) (footnote omitted).

We have found no decisions of the Pennsylvania Supreme Court, or any lower court, purporting to character-

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[11]Section 1988 provides in relevant part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

ize RICO claims under Pennsylvania law for limitations purposes. Nonetheless, if state law were to control the characterization our function would be to predict how the Pennsylvania Supreme Court would act, rather than to apply the principles developed by the U.S. Supreme Court in *Wilson v. Garcia* and other "borrowing" decisions. Thus, we cannot overlook this issue. Fortunately, we believe the resolution is quite clear. Though we cannot rely, as the Court did, on § 1988, we note that its borrowing principles are not unique—the confluence of the Supremacy Clause and the Rules of Decision Act produce the same result in other cases: "If . . . federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed." Western & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 Mich. L. Rev. 311, 316 (1980). Moreover, the federal interests in uniformity and having "firmly defined, easily applied rules," emphasized in *Wilson v. Garcia*, 105 S. Ct. at 1944 (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)) apply with as much force to RICO as to other federal causes, such as § 1983, § 301 of the Labor Management Reporting Act, *see Auto Workers, supra,* or the federal antitrust laws, *see* Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83-84 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961), *Wilson v. Garcia*, 105 S. Ct. at 1944 n.19. We conclude that federal law controls characterization of RICO claims for limitations purposes.

B. Uniform or Particularized Characterization?

In characterizing Malley-Duff's termination-related RICO claims as analogous to claims for common law fraud,

the parties and the district court have followed the settled borrowing practice within this Circuit of parsing the particular factual allegations and legal theories supporting an individual federal claim, rather than looking to the federally-created cause of action for a broader analogy that could encompass all claims brought thereunder in a given state. In *Wilson v. Garcia* the Supreme Court adopted the latter approach in the context of § 1983 cases, and we believe that their reasoning suggests that the same approach should be followed with civil RICO.

In *Wilson v. Garcia* the Court noted that the practice of borrowing state statutes of limitations promotes the policy of repose, but that

> when the federal claim differs from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

105 S. Ct. at 1945 (quoting *Johnson v. Railway Express Agency*, 421 U.S. at 463-64). Section 1983, the Court stated, "can have no precise counterpart in state law . . . [A]ny analogies to those causes of action are bound to be imperfect." *Id.* (footnote omitted).

> In this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983. Almost every § 1983 claim can be

> favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . .
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> . . . If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case. There is no reason to believe that Congress would have sanctioned this interpretation of its statute.

105 S. Ct. at 1945-46 (footnotes omitted).[12] The Court also expressed a concern that the somewhat arbitrary selection of one analogy over another can appear result-oriented, and thereby undermine the appearance of neutral justice. 105 S. Ct. at 1945 n.24. The Court concluded that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach" of selecting "in each State, the one most appropriate statute of limitations for all § 1983 claims." 105 S. Ct. at 1947.

Civil RICO is as far removed from any traditional state cause of action as is § 1983.[13] This is well-illustrated

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[12]This court had followed the case-specific approach rejected by the Supreme Court in *Wilson v. Garcia*. *See* Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974)(in banc).

[13]We do not suggest that civil RICO is a uniquely federal remedy in the same sense as § 1983. A state could, as some have, create a private cause of action substantially similar to civil RICO. *See* Wright, *A Look at State RICO Statutes in RICO: Expanding Uses in Civil Litigation* (1984). Pennsylvania's RICO-type statute, 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1983), how-

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by *Durante Brothers and Sons v. Flushing National Bank,* 755 F.2d 239 (2d Cir.), *cert. denied,* 105 S. Ct. 3530 (1985), where the Court of Appeals rejected the district court's choice of a state statute of limitations for actions to recover an overcharge of interest in a RICO case predicated on collection of an unlawful debt. The court pointed out that the seemingly apt analogy dissolved when the elements of the RICO claim were closely examined:

> In the context of the allegations made here, therefore, success on these counts would require proof that, *inter alia,* (1) there was a RICO enterprise, (2) its activities affected interstate commerce, (3) the individual defendants were employed by or associated with the enterprise, (4) the Bank used, in the operation of the enterprise, income derived from the collection of unlawful debt, and (5) the individual defendants participated in the conduct of affairs of the enterprise through the collection of unlawful debt. 18 U.S.C. § 1962(a) and (c). In addition, to prove that what was collected was an unlawful debt within the meaning of RICO, Durante would have to show that (6) the debt was unenforceable in whole or in part because of state or federal laws relating to usury, (7) the debt was incurred in connection with "the business of lending money . . . at a [usurious] rate," and (8) the usurious rate was at least twice the enforceable rate. *Id.* § 1961(6). And Durante would have to show that (9)

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ever, does not provide for a private cause of action. See D'Iorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982). Though we do not have occasion to so decide, we note that where a state has created a private cause of action substantially similar to the federal civil RICO action, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow, provided the period is not so short as to contravene federal policies.

> as a result of the above confluence of facts, (10) it was injured in its business or property. *Id.* § 1964(c).

755 F.2d at 248.

The court went on to state:

> The above listing of elements that must be proven in order to establish civil RICO liability for collection of an unlawful debt makes clear that the civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury. . . . In contrast, a state law claim . . . could be established without proof of nine of the ten listed elements of the civil RICO claim.

755 F.2d at 248-49. We believe a similar analysis would apply to any RICO claim. Concepts such as RICO "enterprise" and "pattern of racketeering activity" were simply unknown to common law, and all federal crimes contain jurisdictional and other elements irrelevant to any state civil action. Thus, as with § 1983, any analogies to traditional state causes of action "are bound to be imperfect." *Wilson v. Garcia,* 105 S. Ct. at 1945.

This case provides abundant evidence that a particularized approach to borrowing statutes of limitations "inevitably breeds uncertainty and time-consuming litigation." Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A state may even have different limitations periods for common law fraud and securities fraud. *See also Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983), *rev'd in part,* 766 F.2d 770 (3d Cir.), *cert.*

denied, 106 S. Ct. 343 (1985). More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels. The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case.[14] "The current approach is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter." A.B.A. Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 391-92 (1985) [hereinafter cited as "*Task Force Report*"].[15]

In *Wilson v. Garcia* the Court stated that "the legislative purpose to create an effective remedy for an enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." 105 S. Ct. at 1947 (footnote omitted). Like § 1983, civil RICO was intended to be a useful remedial device and a supplement to criminal law enforcement in an area

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[14]The statutory definition of 'racketeering activity,' 18 U.S.C. § 1961(1) contains a laundry list of federal and state offenses. Unless the two alleged predicate acts are closely related, . . . it is unlikely that both acts could be subject to the same statute of limitations. Under these circumstances, the federal court would be saddled with the unenviable task of selecting one of the two disparate limitations periods. Defendants would solve this dilemma by requiring the court to determine which predominates the complaint. Such a process could be arbitrary at best, and this Court is unwilling to engage in such capricious selections. Morley v. Cohen, 610 F. Supp. 798, 809 (D. Md. 1985).

[15]This report was issued March 28, 1985 by a five member task force. It is neither approved by the A.B.A. nor does it represent the A.B.A.'s official position. It was, however, cited extensively by both the majority and dissenters in *Sedima*.

peculiarly in need of federal intervention. *Sedima,* 105 S. Ct. at 3286. As today's cases demonstrate, its effectiveness can be substantially thwarted by uncertainty, with the concommitant dissipation of legal resources. We hold, then, that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims. *See also Electronic Relays v. Pacente,* 610 F. Supp. 648 (N.D. Ill. 1985); *Victoria Oil v. Lancaster Corp.,* 587 F. Supp. 429 (D. Colo. 1984). *But see Silverberg v. Thomson McKinnon Securities,* No. 85-3349 (6th Cir. April 10, 1986).

C. The Applicable Limitations Period

The final stage in our inquiry is the selection of the one Pennsylvenia limitations period that will govern all civil RICO actions arising there. This process of characterization cannot take place in a vacuum—it would accomplish nothing to characterize civil RICO in a way that does not correspond to any existing Pennsylvania statute of limitations. Rather, we must, as the Supreme Court did in *Wilson v. Garcia,* choose the best out of the available candidates. We have been greatly aided in this process by the parties' thorough supplemental briefing.

In *Wilson v. Garcia,* the Supreme Court chose a state limitations period for "personal injury" actions to govern § 1983 cases in New Mexico.[16] Given that the Court had

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[16]The Court was careful to acknowledge that its approach would only achieve uniformity within each state. Though this can, in part, be a result of the fact that states will prescribe different period of years for the same actions, the Court must also have been aware that a characterization useful in one state may

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earlier conceded that characterization "will often be somewhat arbitrary," 105 S. Ct. at 1946 n.24, it should not be surprising that the Court did not present a very detailed rationalization for its choice. Nonetheless, there is some guidance to be extracted from their discussion.

The Court noted that "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort." 105 S. Ct. at 1948. Of the potential tort analogies, the Court stated that "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* The Court's basis for this categorical statement was the language of the fourteenth amendment: "no *person* shall be deprived of life, liberty or property . . ." "A violation of that command is an injury to the individual

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find no counterpart in others. As Justice O'Connor pointed out in dissent, 105 S. Ct. at 1953, on the very day the Tenth Circuit decided *Wilson v. Garcia,* it also held that the personal injury characterization found no counterpart in Colorado's limitations scheme, and therefore adopted a different characterization and borrowed the catchall limitations period for actions on a statute. McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984)(in banc). In still another case decided the same day, the Tenth Circuit borrowed a four-year statute of limitations which applies to actions for relief "not othewise provided for by law" for § 1983 actions arising in Utah, Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984)(in banc), *cert. denied.* 105 S. Ct. 2111 (1985). Thus, Judge Sloviter's concurrence in A.J. Cunningham Packing Corp. v. Congress Financial Corp., Nos. 85-3366 & 85-3380, is not correct in stating that the "absence of an available 'catch all' in all states" distinguishes this case from *Wilson v. Garcia.* Our choice of a characterization for civil RICO actions in Pennsylvania does not preclude choice of a different approach in other states within this Circuit. *See* footnote 13 *supra,* regarding State RICO statutes.

rights of the person." *Id.* The only other point the Court mentioned as favoring the personal injury characterization was that:

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

105 S. Ct. at 1949.

We may also obtain some guidance from the Court's reasons for rejecting two other proposed analogies. First, the Court stated that the "relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states." 105 S. Ct. at 1948 (also noting that § 1983 enforces constitutional, not only statutory rights). Second, the Court rejected an analogy to state remedies for wrongs committed by public officials as it was the very inadequacy of such remedies, "that led Congress to enact the Civil Rights Act in the first place." 105 S. Ct. at 1949 (footnote omitted).

With this background, we proceed to consider the merits of various limitations periods available under Pennsylvania law.[17] The suggested candidates are the

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[17]It has also been suggested that this court borrow the Clayton Act's four-year limitation on private treble damage antitrust suits. In DelCostello v. Int'l Brotherhood of Teamsters,

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limitations periods for common law fraud,[18] for civil penalty or forfeiture, 42 Pa. Cons. Stat. Ann. § 5524 (a "potpourri" two-year statute of limitations), and the "catch-all" six-year residual statute of limitations. Clearly, we should not expect an epiphany through which the "essence" of civil RICO is revealed to us. Rather, we can hope for no more than finding a workable rule that is

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462 U.S. 151 (1983), the Supreme Court held that federal courts should "turn away from state law" and borrow a limitation period from elsewhere in federal law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making." 462 U.S. at 172.

A number of things can be said in favor of this characterization. RICO was drafted with the antitrust model of criminal sanctions supplemented by private treble damage actions in mind. Both the Clayton Act and RICO require that private plaintiffs be persons who have been "injured in [their] business or property." 15 U.S.C. § 15(a);18 U.S.C. § 1964(c). Also, both RICO and the antitrust laws deal with a wide range of conduct affecting commerce. Finally, in favor of this characterization, it can be said that it promotes uniformity—not only within a state, but nationally as well.

The factors militating against this characterization are that (1) though RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of *conduct* that are prohibited; and (2) despite the fact that Congress consciously drew upon the antitrust model in drafting RICO, it did not include a comparable statute of limitations period, perhaps indicating a congressional intent that there not be a national standard. We have been cited no relevant legislative history on this point.

On balance, we do not believe the Clayton Act analogy meets the high standard required by *DelCostello* to justify "turning away from state law." *See also Task Force Report* at 385-392.

[18]As noted previously, it is not clear what that period was at the time this case was filed. *See* footnote 7 *supra* and accompanying text.

consonant with the purposes of civil RICO, and defensible under reasonably neutral criteria of statutory construction.

Fraud

Malley-Duff has suggested that common law fraud would provide a suitable analogy for all civil RICO claims. As one court has stated, however, "it is obvious that the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based." *Electronic Relays,* 610 F.Supp. at 651. We, too, are reluctant to elevate one predicate act among many to the status of a uniform RICO characterization. Even if it is true, as Malley-Duff argues, that fraud is the predicate act upon which most civil RICO actions are premised, *see also Task Force Report* at 55-56, we must note that this trend has been the subject of increasing disquietude over the federalization of state common law. *See Sedima,* 105 S. Ct. at 3293 (Marshall, J., dissenting); 131 Cong. Rec. S10285-88 (1985) (Remarks of Sen. Hatch). Many current proposals to curtail civil RICO are directed to precisely this point. For example, Senate Bill 1521, 99th Cong., 1st Sess. (1985), would require at least one predicate act other than mail, wire, or securities fraud to make out a civil RICO claim.

Though the suggestion is not without some merit, we think that characterizing RICO as essentially a fraud

action would be to have the tail wag the dog. We reject this approach.

Civil Penalty or Forfeiture

It is also suggested that RICO can be broadly analogized to actions for civil penalty or forfeiture. In Pennsylvania such actions are now governed by a two-year statute of limitations, 42 Pa. Cons. Stat. Ann. § 5524(5) (Purdon Supp. 1985), although at the time these cases were brought, it was a one-year period when brought by private parties, 42 Pa. Cons. Stat. Ann. § 5523(2)(1981).

We do not find this analogy forceful. Civil RICO is clearly not a forfeiture statute—the recovery of a successful private plaintiff is based on the injury sustained ("three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"), not on what the defendant has gained through illegal conduct. Nor do we think the treble damage provision is primarily intended as a penalty. *See Task Force Report* at 391. More important, it is an incentive for private attorneys general to bring suit. We would also be concerned that the one-year limitations period that would be applicable to this case if the forfeiture analogy were adopted may, because it is so short, contravene the broad *remedial* purposes of civil RICO. We decline to characterize civil RICO as a penal statute.

42 Pa. Cons. Stat. Ann. § 5524

Section 5524 is a two-year statute of limitations, covering a potpourri of civil actions. It provided at the time relevant to this appeal:

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an inidividual caused by the wrongful act or neglect of or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon execution or otherwise in his possession.

It is argued by amicus Congress Financial Corporation that this two-year period should be borrowed for civil RICO because "it is indisputable that almost all, if not all, of the predicate RICO acts . . . would be included, in a civil context, within § 5524."

We find this proposal without merit. The premise that most, "if not all," RICO predicate acts would be covered by this statute is transparently false. Most RICO predicate acts, such as gambling, obstruction of law enforcement, sports bribery, narcotic trafficking, violations of restrictions on payments and loans to unions, interstate transportation of stolen property, or trafficking in contraband ciga-

rettes, simply do not correspond to private causes of action under common law. As one court, seeking to find a civil RICO analogy under Colorado law has stated: "The search for a precise definition may be futile, however, since Colorado's statutes of limitations retain the language of comman law forms of action." *Victoria Oil,* 587 F. Supp. at 431.

More fundamentally, this proposal does not even do what *Wilson* commands, i.e., *characterize* the federal cause of action. Rather, it seeks to take advantage of the fortuitous circumstances that a number of potential state law analogies share a common limitations period. Such an approach will provide little guidance for the resolution of this problem in other states, and may prove particularly vulnerable to changes in the state statute of limitations scheme. We reject this approach.

"Catchall" Limitations Period

Like most states, Pennsylvania has enacted a residual "catchall" statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations. It provided at the time this case was filed:

> The following actions and proceedings must be commenced within six years:
>
> . . .
>
> (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981).[19] In *Wilson v. Garcia,* the Court considered, but rejected, the application of such a catchall statute to § 1983 claims:

> The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states. Section 1983, of course, is a statute, but it only provides a remedy and does not itself create any substantive rights. . . . Although a few § 1983 claims are based on statutory rights, . . . most involve much more. . . . These guarantees of liberty are among the rights possessed by every individual in civilized society, and not privileges extended to the people by the legislature.

105 S. Ct. at 1948-49 (footnote omitted).

The Court's reasons for rejecting this analogy in the § 1983 context simply do not apply to RICO. RICO was enacted in 1970, long after statutory causes of action and corresponding catchall limitations periods became commonplace. Thus, it would not be disingenuous (or anachronistic) to suggest that Congress might have approved of borrowing such statutes. Second RICO is a strictly statutory remedy to enforce statutory rights. Thus, *Wilson v. Garcia* does not foreclose this court from adopting § 5527 for civil RICO actions arising in Pennsylvania.

The A.B.A. Task Force on Civil RICO specifically approved of cases characterizing RICO in this way:

> There are two varying approaches to characterizing RICO claims. Most courts use the state limita-

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[19]The current catchall provision is the same in all material respects. 42 Pa. Cons. Stat. Ann. § 5527 (Purdon Supp. 1985).

> tions period applicable to state law claims most similar to the *predicate offenses* alleged as part of the RICO claim. These cases in effect assume that the thrust of the RICO claim is to compensate injury caused by the underlying predicate offenses. In contrast, a few courts view RICO claims more broadly as a special statutory cause of action as to which the predicate offenses are only one element. These courts opt for the use of a state statute, if available, applying generally to all statutory causes of action that have no express statute of limitations.
>
> The latter approach seems more consistent with the overall concept of RICO than the former. RICO is manifestly directed towards activities that go beyond the mere commission of predicate offenses, and many courts have balked at the concept of RICO as simply a new or alternative civil remedy for the underlying criminal violations.

Task Force Report at 389-91 (emphasis in original). *See also Compton v. Ide,* 732 F.2d 1429 (9th Cir. 1984); *Teltronics Services v. Anaconda-Ericsson, Inc.,* 587 F.Supp. 724 (E.D.N.Y. 1984), *aff'd,* 762 F.2d 185 (2d Cir. 1985); *Seawell v. Miller Brewing Co.,* 576 F. Supp. 424 (M.D.N.C. 1983). *See also Durante Brothers, supra,* (applying catchall statute to case before court); *Creamer v. General Teamsters Local Union,* 579 F. Supp. 1284 (D. Del. 1984) (same).

Such an approach, moreover, recognizes that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law—the very observation that led us to search for a uniform limitations period in the first place. And like personal injury statutes, the catchall statutes are particularly unlikely to be fixed in a manner that would discriminate against federal claims. Thus, we hold that

civil RICO actions arising in Pennsylvania shall be governed by the six-year limitations period of 42 Pa. Cons. Stat. Ann. § 5527. Because it is clear that the acts relating to the termination of Malley-Duff's agency occurred within six years of the time this action was filed, we will reverse the district court's dismissal of the RICO claims arising out of these alleged acts.[20]

III.

The district court dismissed the RICO claims predicated on the alleged obstructions of justics in *Malley-Duff I* because, it held, interference with a lawsuit did not constitute an injury to "business or property" within the meaning of RICO. We believe, especially in light of the Supreme Court's intervening decision in *Sedima*, that this constituted reversible error.

The district court relied on the analysis of Judge Garity in *Van Schaick v. Church of Scientology*, 535 F. Supp.

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[20]In the wake of *Sedima*, in which both the majority and dissenting opinions stressed the need for courts to develop a meaningful approch to the RICO requirement of a "pattern" of racketeering activity, defendants have argued that, even if timely, Malley-Duff's RICO claims should be dismissed as failing to allege such a pattern. *Sedima* did not, however, give much guidance as to how "pattern" should be interpreted, other than to suggest that "continuity plus relationship" of predicate acts might be required. 105 S. Ct. at 3285 n. 14 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). We have no occasion to define its parameters here. Even under the very restrictive definition of "pattern" defendants would have us adopt, *see Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), *Northern Trust Bank/O'Hare v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985), Malley-Duff's allegations of similar conduct in Cleveland, Chicago and other cities seems to us a sufficient pleading of a "pattern" of racketeering injury.

1125 (D. Mass. 1982), wherein he concluded that "persons injured in their business or property" should be read as meaning "business persons engaged in conventional commercial activity who allegedly suffered commercial injury" and that civil RICO should be "confine[d] . . . to business loss from racketeering injuries." 535 F. Supp. at 1136-37. Interference with a lawsuit, the district court here said, was not such an injury. It went on to state that there were sound policy reasons for construing RICO as not permitting this claim: "There are other remedies available to plaintiff for such wrongs; *e.g.*, discovery sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's 'property'. An enormous multiplicity of suits could result from holding otherwise." App. at 20a.

Though the district court's concerns are substantial ones, we do not believe its analysis can be squared with RICO as it is written or as construed in *Sedima*. If RICO's reference to injury to "business *or* property" is to be given meaning, RICO standing cannot be limited to "business" injuries only. We would certainly think, for example, that an individual harmed in his or her personal property by loansharking activities should have a civil remedy under RICO. A cause of action, of course, if a form of "property," and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as "business injury." The unwritten "racketeering injury" requirement—analogous to the requirement of competitive injury for antitrust standing—

was specifically addressed, and rejected, by the Supreme Court in *Sedima:*

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F.2d at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, [747 F.2d 384, 398 (7th Cir. 1984)].
>
> It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally [*Task Force Report*] at 55-69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its

> diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

105 S. Ct. at 3287 (footnote omitted).

Nor do we agree with the district court that because litigants have other potential remedies for obstructive conduct such as that alleged here, there can be no remedy under RICO. We must assume that by including obstruction of justice among the RICO predicate acts, Congress envisioned the statute being used, where all other requirements are met, to supplement remedies already available for such conduct.[21] Certainly, the possibility of a criminal prosecution cannot be sufficient reason for denying a civil RICO remedy—such a rule would eviscerate civil RICO entirety, since all predicate acts are, by definition, crimes. *See* footnote 1 *supra*. We hold that Malley-Duff's allegations of "great expenses, delays and inconvenience . . . in its prosecution of the First Lawsuit" were a sufficient pleading of injury to business or property to give Malley-Duff RICO standing. *See also Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985).

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[21]Defendants argue that Malley-Duff should be denied a RICO remedy because it opted not to pursue a motion for sanctions within the context of *Malley-Duff I*. This seems to us a question of causation of damages, rather than a question of the type of conduct remediable under RICO. The district court may address the causation issue on remand.

IV.

Count V of Malley-Duff's complaint, based on 42 U.S.C. § 1985(2), *see* footnote 2 *supra*, alleged intimidation of a trial judge, intimidation of plaintiff's counsel, intimidation of witnesses, destruction of evidence, and subornation of perjury, all in the context of the pretrial stages of *Malley-Duff I*. Rely on this court's decisions in *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976), where we held that only acts *directly* affecting parties, witnesses or jurors—and not other acts that may merely influence the proceedings—are cognizable under this statute, the district court summarily dismissed all but the witness intimidation allegations. Malley-Duff does not seem to seriously challenge this holding, and we affirm it.

The district court went on, however, to dismiss the remaining § 1985(2) allegations on the ground that the complaint did not allege that any witness was actually deterred from testifying "in court," but rather complained of delays, expenses, inconvenience, and the suppression of evidence during the pretrial phase. We think this is a crabbed and unwarranted reading of the statute, the language "in any court" is not as plain as the district court seemed to surmise and cannot be read so literally—a case may be described as "in" a certain court, even though no actual "courtroom" proceedings take place. Similarly, we think that a person asked to provide discovery in such a case, regardless of where or in what form, is for these purposes a witness "in" the court. Indeed, the statute distinguishes between being deterred from "attending such court" and from "testifying to any matter pending therein." As a policy matter, we think the statute's less than pellucid language should be read with a view to the fact

that pretrial proceedings in 1870 did not have the importance they have today. Because cases can be won or lost, or their value substantially diminished, as a result of intimidation that affects witnesses' willingness or ability to provide discovery, we hold that the statute applies.[22]

The case the district court relied on in holding that pretrial intimidation does not give rise to a cause of action under § 1985(2) is not on point. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.)(in banc), *cert. denied*, 454 U.S. 1110 (1981) involved a claim that employees were terminated for having filed worker's compensation claims. The statute refers to retaliation for giving testimony, not for the filing of complaints. Thus, the Fifth Circuit could not square the case before it with the language of the statute.

A case closer to this one is *Chahal v. Paine Webber*, 725 F.2d 20 (2d Cir. 1984), where the § 1985(2) claim alleged that the defendants had conspired to intimidate an expert witness into withdrawing from the case. The underlying case had not gone to trial when the § 1985(2) claim was brought, but nonetheless the court of appeals found a claim stated. Contrary to the district court here, which held that the only cognizable injuries are the actual failure

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[22] *See also* Chahal v. Paine Webber, 725 F.2d 20, 24 (2d Cir. 1984):

> The statute does not define the term "witness." However, Congress' purpose, which was to protect citizens in the exercise of their constitutional and statutory right to enforce laws enacted for their benefit, is achieved by interpreting the word "witness" liberally to mean not only a person who has taken the stand or is under subpoena but also one whom a party intends to call as a witness. Deterrence or intimidation of a potential witness can be just as harmful to a litigant as threats to a witness who has begun to testify.

of a witness to appear at trial, resulting in diminished recovery or loss of a lawsuit, the Second Circuit found it sufficient to allege as injury "the $1,410 paid to [the expert] for his services, and cost of preparing him to assist in [the underlying] action. In any event one need not suffer monetary damage to prevail in an action for denial of civil rights." 725 F.2d at 24.

We agree with the Second Circuit that "[t]he essential allegations of 1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiffs." 725 F.2d at 23. *See also Miller v. Glen & Helen Aircraft,* 777 F.2d at 498. Under this standard, Malley-Duff's allegations are sufficient to state a § 1985(2) claim of witness intimidation.[23]

V.

Having dismissed all of Malley-Duff's federal claims, the district court exercised its discretion and dismissed its pendent state claim for civil conspiracy as well. Because we reverse the dismissals of the federal claims, we will also reinstate the pendent claim for further consideration, intimating no view as to its sufficiency, timeliness, or merits.

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[23]The district court stated that even if its interpretation of § 1985 (2) was erroneous, as we have now held, "plaintiff's action may yet be barred by the statute of limitations." (Emphasis added.) This does not quite rise to the level of an alternative holding, and we do not find sufficient material in this record to make this determination ourselves. Nor has the issue been argued or briefed. We will therefore leave this issue open on remand.

CONCLUSION

For the reasons stated in the foregoing opinion, we will reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

SLOVITER, *Circuit Judge,* Concurring in the judgment.

I join in Parts I, III, and IV of the majority opinion. As set forth in my concurring opinion in *A.J. Cunningham Packing Corp. v. Congress Financial Corp.,* Nos. 85-3380, 85-3366, filed today, I disagree with the majority's approach in looking to state statutes of limitations to find one applicable to civil RICO claims. Instead, I would apply the four year statute set forth in section 4 of the Clayton Act, 15 U.S.C. § 15b. The argument that a federal statute of limitations should govern was not presented by plaintiffs in this action. Nonetheless, my comments in *A.J. Cunningham* are equally applicable to the issue presented here.

Because the plaintiffs in this case filed their complaint within four years of the date that their claim accrued, I agree with the majority that their complaint was filed timely and I therefore concur in the majority's reversal of the judgment of the district court and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.,

Appellant,

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP., an Illinois Corp.
AGENCY HOLDING CORP., an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK CRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG, INC.,
a Pennsylvania Corporation
ROBERT OGLEVEE, individual

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by appellees, Crown Life Insurance Company and Clarke Burton Lloyd, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.
A. Leon Higginbotham, Jr.
Circuit Judge

Dated: July 1, 1986